

No. 9469.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT 2

UNITED STATES OF AMERICA,

Appellant,

vs.

ARMATURE EXCHANGE, INCORPORATED, a corporation, also
known as THE ARMATURE EXCHANGE, a corporation,
also known as THE ARMATURE EXCHANGE, INCORPORATED, a corporation,

Appellee.

BRIEF FOR THE APPELLEE.

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BRIEF FOR THE APPELLEE.

Opinion Below.

The opinion of the District Court [R. 11] is reported in 28 Fed. Supp. 10.

Jurisdiction.

This is an appeal from a judgment of the District Court entered September 13, 1939 [R. 41], in the amount of \$1,452.30, without interest, assessed and paid as manufacturer's excise taxes. Notice of appeal was filed December 12, 1939. [R. 42-43.] The jurisdiction of this Court is invoked under Section 128 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether sales of rewound automobile generator armatures by appellee were taxable under Section 606(c) of the Revenue Act of 1932, imposing tax upon automobile parts, "sold by the manufacturer, producer, or importer" thereof.

Statutes, Regulations and Rulings.

The applicable statute and regulations involved will be found in the appendix to this brief.

Statement.

The case was tried by the Court without a jury, and the evidence consisted of the testimony of three witnesses for appellee, together with numerous exhibits and documentary evidence adduced by each of the parties. After oral argument the Court rendered an oral opinion [R. 11-26], and subsequently filed findings of fact and conclusions of law in favor of appellee. [R. 28-40.] The mechanical facts, as disclosed by the undisputed evidence, were summarized by Judge Yankwich in his opinion as follows [R. 12-17]:

"The plaintiff takes old armatures on which the winding has been worn off and rewinds them.

"The process used is this: The armatures are placed in a lathe and the wires leading from the core to the commutator are cut out with a knife as the lathe revolves. The cores are then heated over a gas flame for about twenty minutes (the flames coming up from a range within the metal box), the purpose of

which being to loosen the old wires and old insulation, so that they may be easily removed. After the armatures are laid out on a metal top table and slightly cooled, they are placed in a V-shaped slot, and a steel chisel is driven down between the mass of old wires which have been loosened by heating, and the old wires are pried out. The armatures are then placed in a machine equipped with a small saw which reslots each commutator bar at the place where old wires were soldered in (i. e. at the end of the commutator closest to the core). This machine operates by suspending the shaft on which the core and commutator are mounted between a clamp, and the sawblade about one and one-half inches in diameter is moved up to each slot by means of a lever, and the shaft is rotated by hand. Any solder remaining in the slots is removed with a small metal pick. The placement of the commutator on the shaft is checked with a pair of calipers by measuring from the point on the shaft where the bearing rides to the [11] front end of the commutators. The distance from the core to the commutator is measured with a metal rule. Any errors in the mounting of the core or commutator on the shaft are corrected by means of adjusting their respective placements by means of an arbor press. The laminations of almost every core are pressured together on this same press before any further steps are taken, in order to realign any laminations which may have become somewhat separated. To insure that none of the bars on the commutator are grounded to the shaft, or shorted, a test is given by rotating the end of a live wire over the commutator, and at

the same time having the shaft grounded. Then each portion of the shaft leading from each side of the core is insulated by approximately five wrappings of paper around the shaft as it protrudes from each end of the core. The insulation is about an inch or so in length. Each slot in the core is also insulated by placing it in a folded insulated paper approximately the size of a cigarette paper; and each surface end of the core is insulated with a heavy pressed cardboard which has been stamp-cut the shape of the surface ending of the core. Approximately 95 per cent of the armatures are rewound on a Chapman winder, designed to rewind armatures with fourteen-slot cores. Those which have a different number of slots must be rewound by hand. This machine has a lathe, in which two jaws hold the laminated core in such a manner that the shaft extends perpendicularly from the axis of the lathe an equal distance in each direction. Two strands of wire lead from two different reels up through the top of the machine, over pulleys and down to the armature in the jaws of the lathe. Two sizes of wire are used in the winding, depending upon the electrical output expected out of the generator; i. e., heavier wire can give a greater output. Each coil is wound with six complete turns. [12] On each turn, the wire in the slot on one side of the core leads into each slot, making, therefore, in the case of a fourteen-slot core, twenty-eight coils. Upon the completion of each coil,—that is, after six turns,—the wire is laid up over the commutator end of the shaft, and, at the conclusion of the next coil following, that particular wire is cut near the com-

mutator-end of the shaft and the lead end of the wire folded back. However, the lead ends on the top coils of the half of the core that is lastly wound are not cut by the winder operator, because there is no necessity of cutting them, but are left suspended in a loop over the commutator end of the shaft. The only reason for cutting the other wires is because they are from coils that are underneath and, if they were not cut, the wire from the top coil would bind them down to the shaft. The armature is then placed in a lathe-like clamp, called a bench center, which clamp suspends the armature by holding it at each end of the shaft. Then all of the wires which were not previously cut by the operator on the winding machine are cut. This leaves fifty-six leads, with two ends to each coil, and two coils to each slot. To hold the wires in the slots, wooden wedges are then driven over the top of the wires and into each slot of the laminated core. The leads are pulled down in three equal groups and the ends of the leads inserted into an electrically driven machine with two wire rollers operating in opposite directions, which cleans all of the insulation from the leads for a distance of about two inches from the ends of the leads. These leads extend approximately four inches out of the slots of the core. The leads from the top coils are folded back over the core, and then the leads from the bottom coils are similarly folded back, so as to make them easily available to the operator when he is [13] connecting them with the commutator. There are four sets of leads, corresponding with the sets of

coils in the armature. Those leads are inserted firmly in place by means of a small chisel. As the leads are connected, the operator rotates the armatures. A connection of a set of leads is completed with each rotation. As each complete rotation is made, the wires which now lead from the core to the commutator are insulated by wrapping with insulating paper approximately one and one-half inches in width. Since there are four complete sets of leads, this makes three sets of insulation, the top leads being exposed. Twine is then wrapped around just behind the commutator with about seven turns, so that should the soldering holding the leads into the commutator become hot, the cord will still keep the leads in place. Solder flux is painted around the commutator where the wires have been tapped into the slots. The whole commutator is then immersed into solder, the solder only adhering to the band where the flux has been applied. The armatures are then placed on end into a tray and the tray is lowered into an insulating varnish, where it remains for about fifteen or twenty minutes, so that the cotton insulation of the wire will be completely saturated. The tray is then raised, and the armatures drained for approximately thirty minutes. The armatures are placed in an electric oven, and baked overnight at a temperature of about two hundred and fifty degrees. The total day's production is generally dipped and baked at one time. The armature is taken from the oven and placed in a lathe where the commutator is planed down sufficiently to true the brush surface of the commutator.

The end of the shaft of the armature is placed into a chuck and is rotated, and, by applying an abrasive cloth to the sur- [14] face of the laminated core, the shaft and the commutator, they are polished and all the excess varnish is removed from the metal. The armature is then placed between centers and a small saw blade, approximately one-quarter of an inch in diameter, cuts the level of the mica insulation between the commutator bars to a level below that of the surface of the bars of the commutator. The armature is tested for shorts, by placing it onto a magnetic growler (that is, by setting the core part on the magnet) and if there is a short in the armature, a thin metal blade will be attracted to the core. The armature is tested to see if it is grounded by touching one wire to the shaft and the other to the commutator, and if it is grounded, the connection is made and a light attachment is illuminated. The shafts are then checked for undersize with a micrometer. If the shaft is too far undersize, it has to be knurled or sleeved. The shaft is roughened so that it will fit snugly with a bearing. If the shaft is too small to be knurled, it must be turned down on a lathe and a metal sleeve driven over it. About fifty per cent of the shafts must be knurled, and about fifteen per cent must be sleeved. The armatures are then finally checked by rotating the commutators under a micrometer, to insure that every bar of the commutator is of approximately the same height, otherwise proper contact with the generator brushes will not be made. The ends of the shafts are then rethreaded and the armatures are ready for boxing.”

ARGUMENT.

I.

The Rewinding of Used, Secondhand Armatures Is Not the Manufacture or Production of Armatures, But Is Only the Repair, Restoration or Reconditioning Thereof.

(a) MANUFACTURING OR PRODUCTION CONSISTS OF THE APPLICATION OF LABOR OR SKILL BY HAND OR MACHINERY SO THAT AS A RESULT THEREOF A NEW, DIFFERENT AND USEFUL ARTICLE OF COMMERCE IS PRODUCED.

In this case plaintiff seeks a refund of manufacturer's excise taxes paid by it upon the sale of used, secondhand automobile generator armatures which plaintiff had rewound and repaired. All of said armatures were secondhand armatures when acquired by plaintiff. That is to say, all of the armatures which plaintiff rewound had been manufactured by some one at some prior time and had actually been used as operating parts of automobile motors. By reason of such use, the wire coils on the armatures had become damaged or burned out.

On direct examination, Harry E. Seneker, a witness for the plaintiff, explained the usual causes of armatures burning out [R. 102-103]:

“Q. What is the usual cause of armatures burning out?

A. Well, the usual cause is the armature brushes—I mean the generator brushes become worn and too short, so that they don't touch the commutator, especially in the take-off brush. It becomes too short, and it is the same as a generator running

on an open circuit. Therefore, it creates excessive heat and burns itself out.

“Another reason is that a generator will be set up at too high a rate, too excessive a charge, and creates so much heat that it burns itself out.

Q. Any other causes?

A. Well, failure to upkeep the generator. For instance, the commutator will wear itself down so that the brushes begin touching the mica between the bars; the brushes fail to make contact, and the same result, the armature will create excessive heat and burn itself out.

“Also, if a man fails to keep his generator oiled, the bushings may wear so that the armature will slightly touch the pole shoes and create friction and burn itself out. That is about all that I know of, right at present; the most important ones.”

The plaintiff in this case repaired armatures damaged as above related. The method of repairing is set forth in the record (Joint Exhibit No. 1). From the series of 21 pictures and the explanatory statement of each contained in said exhibit, it can readily be seen that there is no loss of identity or dismantling of the component parts of the armatures. In fact, uncontradicted testimony of the plaintiff's witness, Alfred Prescott Daniels, was as follows [R. 75-76]:

“The only part that was removed was the winding or the wire from the armature.”

“No, there was no identification removed.”

Therefore, if the plaintiff's rewinding process commenced with an armature and ended with an armature, it is obvious that nothing has been manufactured or pro-

duced. No new article of commerce has been produced by the process; no new thing has been brought into existence. When the rewinder commenced his work he had an armature (Joint Exhibit No. 1, page 1). When his work was completed he still had an armature (Joint Exhibit No. 1, page 21). It makes no difference how long it took him to do the work, or how many different pieces of machinery he employed during the process, or whether he worked alone in a small shop, or whether he worked with many other workmen in a large plant, or whether, after the process was completed, he immediately reinstalled the armature in the automobile from which it was taken, or whether he laid it upon a shelf and subsequently exchanged it for another used, second-hand armature. The question is, "What did the rewinder do?" Did he produce or manufacture a new article? Did he merely repair an article which someone had previously produced or manufactured? Manifestly, he has repaired an armature. His work commenced after the manufacture or production of that armature had long since been completed and the armature had actually seen service as an operating part of an automobile engine.

The principle which lies at the bottom of the foregoing proposition was recognized and stated by the court in *Thurman, Collector, v. Swisshelm, et al.* (C. C. A. 7) 36 Fed. (2nd) 350. In that case the taxpayer dealt in automobiles. They bought completed Ford automobiles from the Ford Company or its agents. They bought from the Ames Company automobile bodies so constructed that

they would fit the Ford chassis. They would remove the Ford bodies from the automobiles and replace them with the Ames bodies. The question was whether the taxpayers by that process became the manufacturers or producers of automobiles so as to become liable for the manufacturer's excise tax on the automobiles. The court held that the mere exchange of one body for another upon a completed automobile, originally manufactured by someone other than the taxpayers, did not constitute manufacturing or production. And in holding, the court distinguished the case of *Klepper v. Carter* (C. C. A. 9) 286 Fed. 370, in which the tax had been sustained as to a taxpayer who bought a truck chassis from one company and a body from another company, and then assembled the parts "for the first time into a complete truck," and said l. c. 351:

"The facts are different in that there no truck figured in the transaction until the parts had been assembled and connected; while here appellees bought the completed automobile, upon which the tax had already been paid."

The principle underlying the *Swisshelm* case is in nowise different than in the case at bar. *Swisshelm* commenced his process with an automobile, completely manufactured and tax paid by the manufacturer; the plaintiff in this case commenced its work with an armature previously manufactured and tax paid by a manufacturer. When *Swisshelm* finished his process, he still had an automobile—he had created nothing new; when plaintiff in this case completed its rewinding process, it still had an armature—it had created nothing new.

On the question of the taxability of rebabbitted connecting rods the Bureau of Internal Revenue itself recognizes that the rebabbiting process is one of repair and not of manufacture. In S. T. 573, Internal Revenue Bulletin, Cumulative Bulletin XI-2, page 473, the bureau ruled as follows [App. p. 43]:

“The tax also attaches to rebabbitted connecting rods and reclaimed brake drums in which new steel bands have been inlaid where they are placed in stock to be sold as parts and accessories. However, *where these articles are reconditioned in connection with an immediate repair job the tax does not attach.*” (Italics supplied.)

This ruling in express language recognizes that the process involved is one of *reconditioning and repairing*. The Act (Section 606(c)) does not make reconditioned or repaired parts taxable simply because they are carried in a service stock.

Under the foregoing ruling it is held that if a garage man removes an armature from an automobile motor which he is repairing and immediately rewinds the armature and replaces it in the motor, he has done nothing more than a repair job; he has not manufactured the armature. On the other hand, the bureau would hold that if he exchanges the armature he has just removed from his customer's automobile for an armature taken from some other customer's automobile and rewound the day before, he has manufactured the armature. Yet there is no difference in the rewinding process in the two cases. The only difference is in the service which he is able to render his customer. In the first instance, the customer must wait for his automobile until the rewinding can be done; in the second case, the customer is put to no such inconvenience.

The actual process of rewinding, however, is the same in both cases as that which takes place in the plaintiff's shop.

Jobbers, garage men and even the owners of fleets of automotive equipment sometimes maintain their own rewinding service and rewind their own armatures and those of their customers. No reason is suggested, and it is submitted no reason exists, why rewinding an armature in such a case and under such circumstances is mere repair or reconditioning, whereas manufacture is said to occur when, as in plaintiff's case, an armature is rewound in the same way but is not immediately replaced in the motor from which it was removed, but is held on the shelf for a time and subsequently exchanged with a customer whose armature is burned out and who does not desire to wait while his own armature is rewound.

The Bureau of Internal Revenue in its regulations and in various published rulings has recognized and adopted the usual and commonly accepted definition of the words "manufacture" and "produce." It has recognized that manufacture occurs only when the materials which enter into the process lose their identity as such and emerge from the process as a new article. In other words, it is recognized that when a thing is manufactured, it exists for the first time at the conclusion of the manufacturing process. Thus in Article 4 of Regulations 46 of the Treasury Department relating to excise taxes on sales as imposed by the Internal Revenue Act of 1932, it is provided [App. p. 46]:

"As used in the act, the term 'producer' includes a person who produces a taxable article by processing, manipulating or changing the form of an article, or producing a taxable article by combining or assembling two or more articles."

Likewise in S. T. 648, Internal Revenue Bulletin, Cumulative Bulletin XII-1, page 384, the bureau in ruling upon the taxability of retreaded automobile tires said [App. p. 44]:

“The test of taxability where old material or material partly old and partly new is used in producing a tire suitable for use is whether the work done constitutes the manufacture of a tire or is merely a repair job. If the former, the tax is legally due. If the latter, no tax is involved. It is held that where the identity of the old tire is lost in the process, the manufacture of a taxable tire results.

* * * * *

“The retreading of old tires by resurfacing or replacement of the actual tread down to the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article.”

Again in S. T. 606, Internal Revenue Bulletin, Cumulative Bulletin XI-2, page 476, the bureau in ruling upon the taxability or rebuilt and reconditioned taximeters said [App. p. 43]:

“No tax is due upon the sale of rebuilt or second-hand taximeters under Section 606(c) of the Revenue Act of 1932, provided they are not rebuilt or refinished to the extent that they lose their original identity.”

The courts have been frequently called upon to define, and apply the definition of, manufacture. A leading and often cited case is *Hartranft v. Wiegmann*, 121 U. S. 609. The issue in that case concerned the rate of duty to be levied upon certain shells depending upon whether

they were or were not “manufactured.” The question involved and the facts are stated in the opinion by Mr. Justice Blatchford, as follows, l. c. 613-14:

“The question is whether cleaning off the outer layer of the shell by acid, and then grinding off the second layer by an emery wheel, so as to expose the brilliant inner layer is a manufacture of the shell, the object of these manipulations being simply for the purpose of ornament, and some of the shells being afterwards etched by acids, so as to produce inscriptions upon them. It appears that these shells in question were to be sold for ornaments, but that shells of these descriptions have also a use to be made into buttons and handles of penknives; and that there is no difference in name and use between the shells ground on the emery wheel and those not ground. It is contended by the government that the shells prepared by the mechanical or chemical means stated in the record, for ultimate use, are shells manufactured, or manufacturers of shells, within the meaning of the statute.”

The conclusion of the court and the reasoning supporting it are set forth in the following excerpt from the opinion, l. c. 615:

“We are of the opinion that the shells in question here were not manufactured, and were not manufactures of shells, within the sense of the statute imposing a duty of 35 per centum upon such manufacturers, but were shells not manufactured, and fell under that designation in the free list. They are still shells. *They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell.* The application of labor to an article, either by hand or by mechanism, does not make the article necessarily

a manufactured article, within the meaning of that term as used in the tariff laws. Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton. In 'Schedule M' of Section 2504 of the Revised Statutes, page 475, 2nd Edition, a duty of 30 per cent *ad valorem* is imposed on 'coral, cut or manufactured'; and, in Section 2505, page 484, 'coral, marine, unmanufactured,' is exempt from duty. These provisions clearly imply that, but for the special provisions imposing a duty on cut coral, it would not be regarded as a manufactured article, although labor was employed in cutting it. In *Frasce v. Moffit*, 20 Blatchf. 267, it was held that hay pressed in bales, ready for market, was not a manufactured article, although labor had been bestowed in cutting and drying the grass and baling the hay. In *Lawrence v. Allen*, 48 U. S. 7 How. 785, it was held that india rubber shoes, made in Brazil, by simply allowing the sap of the india rubber tree to harden upon a mold, were a manufactured article, because it was capable of use in that shape as a shoe, and had been put into a new form, capable of use and design to be used in such new form. In *United States v. Potts*, 9 U. S. 5 Cranch 284, round copper plates turned up and raised at the edges from four to five inches by the application of labor, to fit them for subsequent use in the manufacture of copper vessels, but which were still bought by the pound as copper for use in making copper vessels, were held not to be manufactured copper. In the case of *United States v. Wilson*, 1 Hunt's Merchants' Magazine 167, Judge Betts held that marble which had been cut into blocks for the convenience of transportation was not manufactured marble, but was free from duty, as being unmanufactured.

“We are of the opinion that the decision of the circuit court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, ‘as duties are never imposed on citizens upon vague or doubtful interpretations.’ *Powers v. Barney*, 5 Blatchf. 202; *U. S. v. Isham*, 84 U. S., 17 Wall. 496, 504; *Gurr v. Scudds*, 11 Exch. 190, 191; *Adams v. Bancroft*, 3 Sumn. 384.”

In *Anheuser-Busch Brewing Association v. U. S.*, 207 U. S. 556, the plaintiff sued to recover certain import duties which it had paid on corks designed for use in bottling beer. Under the act there involved plaintiff was required to prove as the basis of its refund or “drawback” that the corks involved were not manufactured corks, but merely materials imported to be used in the manufacture of corks in the United States. The evidence showed that the corks when imported into this country from Spain had already been cut by hand to the required size. It was further shown that in such condition, however, they were not suitable for use in bottling beer because they would not retain the gas in the bottle and because they would impart a cork taste to the beer, thereby making it unmarketable and unfit for use. After importation, however, the corks were subjected in the brewing company’s plant to various processes and treatment consuming several days of time, during which the corks were treated, processed, sealed and coated so as to render them useful for the intended purpose. The court found that the process to which the corks were subject did not constitute manufacture; that the corks were manufactured before they

were imported and that the brewing company was not entitled to its refund. In the opinion by Mr. Justice McKenna it is said, l. c. 559:

“The corks in question were, after their importation, subject to a special treatment which, it is contended, caused them to be articles manufactured in the United States of ‘imported materials’ within the meaning of Section 25. The Court of Claims decided against the contention and dismissed the petition. 41 Ct. Cl. 389.

“The treatment to which the corks were subjected is detailed in Finding 3, inserted in the margin.

“In opposition to the judgment of the Court of Claims counsel have submitted many definitions of ‘manufacture,’ both as a noun and a verb, which, however applicable to the cases in which they were used, would be, we think, extended too far if made to cover the treatment detailed in Finding 3 or to the corks after the treatment. The words of the statute are indeed so familiar in use and meaning that they are confused by attempts at definition. Their first sense as used is fabrication or composition,—a new article is produced of which the imported material constitutes an ingredient or part. When we go further than this in explanation, we are involved in refinements and in impractical niceties. Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft v. Wiegmann*, 121 U. S. 609,

7 Sup. Ct. Rep. 1240. *There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'* This cannot be said of the corks in question. A cork put through the claimant's process is still a cork." (Italics supplied.)

In the case of *American Fruit Growers, Inc. v. Brogdex Company*, 283 U. S. 1, the court was obliged to determine whether the process of impregnating the rind of an orange with borax, thereby rendering it resistant to mold and decay, constituted manufacture. In the opinion of Mr. Justice Reynolds, it is said, l. c. 11:

"Answering affirmatively the circuit court of appeals said: 'The product claims define an article of manufacture, since the fruit is the result of a process which is defined and described and not a natural product. The product is a combination of the natural fruit and a boric compound carried by the rind or skin in an amount sufficient to render the fruit resistant to decay. The complete article is not found in nature and is thus an article of manufacture. *Riter-Conley Mfg. Co. v. Aiken*, 121 C. C. A. 655, 203 Fed. 699.' (35 Fed. (2nd) 107.)

"This position, we think, is not tenable.

"'Manufacture,' as well defined by the Century Dictionary, is 'the production of an article for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand labor or by machinery.' Also, 'anything made for use from raw or prepared materials.'

“Addition of borax to the rind of natural fruit does not produce from the raw material an article for use which possesses a new or distinctive form, quality, or property. The added substance only protects the natural article against deterioration by inhibiting development of extraneous spores upon the rind. There is no change in the name, appearance, or general character of the fruit. It remains a fresh orange fit only for the same beneficial uses as theretofore.”

De Jonge v. Magone, Collector, 159 U. S. 562, involved a question as to whether certain imported paper constituted “manufacture of paper” or fell within the description of certain specific types of paper which took a higher import duty. The paper in question received certain surface treatment, some of it producing an imitation of leather which was known as “velvet paper.” The court in the opinion of Mr. Justice White said, l. c. 567:

“It is not reasonable to suppose that Congress assumed that the manipulation or treatment of particular paper in the completed condition in which produced at a paper mill, by mere surface coating, *a process which did not change its form, but only increased the uses to which such paper might be put*, had the result to cause the article to cease to be paper and to become a manufacture of paper, especially in view of the continued commercial designation of the article as a variety of paper and its sale and purchase in commerce as paper. (Italics supplied.)

“Congress must be presumed to have known that the paper employed in paper hangings and paper for screens or fireboards, was printing paper, sized in the paper mill, and subjected to treatment elsewhere, by which the value of the article as paper was greatly enhanced, and the association of those products with the writing and drawing class of paper in the paragraph in question is convincing evidence that paper hangings were produced was regarded as paper and not as manufactures of paper. Not alone to avoid doubt or confusion, would such products as paper hangings likely be provided for specifically, rather than in association with writing and drawing paper, if deemed to be ‘Manufactures’ of paper, but as an article clearly a manufacture of paper, to-wit, ‘paper envelopes,’ was assessed at a duty of twenty-five per cent *ad valorem*, opportunity existed to place paper hangings in the same paragraph, and such would likely have been done if paper hangings had been deemed ‘manufactures of’ and not ‘paper.’”

In *Hughes v. City of Lexington*, 277 S. W. 981, the appellant was a corporation engaged in the business of making and selling ice cream. Nevertheless, the City of Lexington contended that the corporation was not engaged in manufacturing within the meaning of the state statutes which exempt from city taxes machinery, material and supplies used in manufacturing. In the opinion by Clark, C. J., it is said, l. c. 982:

“The sense in which the term is here used, as well as the purpose intended to be accomplished by the act, is

quite plain. Obviously, the term 'engaged in manufacturing' was not employed in any technical sense, but must be accorded its ordinary meaning as commonly understood. And, while incapable of exact definition, nevertheless it is true, as was stated in several of the above cases, that according to common understanding and generally speaking, manufacturing consists in the application of labor or skill by hand or machinery to material so that as a result thereof, a *new, different* and useful article of commerce is produced." (Italics supplied.)

The foregoing cases emphasize and reiterate the principle that whether a given process constitutes manufacturing depends upon whether the process results in the creation of a new thing. If that which emerges at the conclusion of the process is the same thing which entered the process at its beginning, notwithstanding some labor and some new materials have been expended upon it during the process—in other words, if the thing retains its identity during the course of the process and after it is completed—then no manufacturing or production has occurred. If the article before the process commenced was a cork and it emerged from the process still a cork, there has been no manufacture. By the same token, the principle as applied to the case at bar leads inevitably to the conclusion that since the armatures in question did not lose their identity during the rewinding process, but were armatures when they entered plaintiff's plant and were still armatures when they left the plant, there was no manufacture.

(b) THE MERE REPAIR, RESTORATION OR RECONDITIONING OF AN ARTICLE DOES NOT CONSTITUTE MANUFACTURING OF PRODUCTION.

An essential distinction must be preserved between manufacture which, as above shown, results in the creation of a new article, and mere repair which results only in the restoration of partial injury but does not create a new article. When an article which consists of several component parts sustains wear or suffers injury to one of those parts, the plain economics of the situation dictate that the injured part, if possible, shall be replaced or repaired, rather than that the entire article shall be wastefully discarded. A man may drop his watch and break the balance staff so that its usefulness as a timepiece is, for the time being, destroyed. But in such a case the owner does not throw his watch away and buy another. Instead, he takes it to a skilled mechanic who replaces the broken or damaged part and restores the watch to its former condition of usefulness. No one would argue in such a case that the jeweler had manufactured a watch. The admitted fact is that the owner took a watch to him. True, the watch was damaged and would not operate, but it was, nevertheless, a watch. After the jeweler had repaired the balance staff, it was still a watch—the same watch. It never lost its identity as a watch. Such is the process of repair or restoration as distinguished from the process of manufacture.

The distinction between repair or restoration, on the one hand, and manufacture or construction, on the other

hand, is often called in question and decided in patent cases.

Perhaps the leading case in this field is *Wilson v. Simpson*, 9 How. 109. In that case the owner of a patented planing machine had repaired or reconditioned his machine by placing therein certain new parts, particularly the knives or cutting tools which were the important operative agency of the machine or, as it is sometimes said, the ultimate effective tool. Notwithstanding the fact that the cutting tools were the most vital and important part of the machine and did the very work for which the machine was designed, the court had no difficulty in finding that their replacement constituted only repair of the machine and not manufacture or production of a new machine so as to infringe the patent. In the opinion by Mr. Justice Wayne it is said, l. c. 123:

“But it does not follow, when one of the elements of the combination has become so much worn as to be inoperative, or has been broken, that the machine no longer exists, for restoration to its original use, by the owner who has bought its use. When the wearing or injury is partial, then repair is restoration, and not reconstruction.

“Illustrations of this will occur to anyone, from the frequent repairs of many machines for agricultural purposes. Also from the repair or replacement of broken or worn-out parts of larger and more complex combinations for manufactures.

“In either case, repairing partial injuries, whether they occur from accident or from wear and tear, is only refitting machine for use. And it is no more than that, though it shall be a replacement of an essential part of a combination. It is the use of the

whole of that which a purchaser buys, when the patentee sells to him a machine; and when he repairs the damages which may be done to it, it is no more than the exercise of that right of care which every one may use to give duration to that which he owns, or has a right to use as a whole.”

In *Hess-Bright Mfg. Co. v. Bearing Co.*, 271 Fed. 350, the court considered a case involving the alleged infringement of a patent upon a ball bearing. The bearing consisted of a groove of a certain depth with balls exactly fitting it. The vendee of this patented bearing re-ground or smoothed up the groove, an operation which necessarily resulted in somewhat enlarging the groove. This necessitated installing larger balls to fit the enlarged groove. The question was whether or not the owners of the bearing had constructed a new bearing so as to infringe the patent or whether he had merely repaired his bearing. The court found that there was no manufacture involved in the process and that the patent had not been infringed. In the opinion by Dickinson, district judge, it is said, l. c. 351:

“Council for plaintiff does not, of course, formulate the claim of right as defendant states it. He does not deny to the vendee of plaintiff the right to repair. What he does deny is any right, by using plaintiff’s bearing as a model, to make a new bearing from the raw material of the old one. It is obvious that all this is nothing more than opposing statements of the effect of what the defendant had done. The defendant calls it the repair of old bearings. The plaintiff calls it new construction or reconstruction. Omitting the name properly to be applied to what was done, the fact finding is made that what was done was the regrinding of the groove

of old bearings, and, when required, the substitution of new balls to fit the grooves enlarged by the regrinding.

“The dividing line between repairs and a making over cannot be verbally located. What has been done can with more or less confidence be pronounced to be one or the other, but neither the one nor the other can be defined. The judgment pronounced must in consequence partake of the *ipse dixit* or rescript character. A further consequence is that the adjudged cases provide us with little for our guidance. With no thought of finding a better mode of expression for the clearly presented views of counsel for plaintiff, it may be premised that a feature of the patented bearing is the metallic pathway provided in the form of a groove, which calls for the use of balls of a certain size. The nicety of adjustment required can be most emphatically expressed by the statement that the unit of measurement employed is the ten-thousandth part of an inch. This groove may, from use or abuse, be in need of being remade by regrinding. The lightest repolishing, almost, is such.

“The argument that this is not repair, but a new construction, may be thus expressed: A bearing with a groove of a certain depth, with balls exactly fitting it, is sold by the plaintiff to A. Another bearing, with a different groove, calling for the next larger size balls, is sold to B. The first vendee smooths up the groove in his bearing, thus adopting it to the next larger size of balls. By so doing he has not repaired the bearing sold to him, but out of the material in this old bearing he has made a new one, which is not his old bearing, but a different bearing of the B type. In other words the old A bearing has lost its identity by destruction, and a new

bearing, B, has been made. In a sense this is, of course, true; but it is only true in a sense. Identity is not lost by a mere change in size. The rule of which we are in search is a practical rule for the guidance of practical men in practical business. What the patentee sells is a concrete thing. It is a bearing. As long as it remains the bearing of the patent, it is what the patentee sold. The moment it becomes something else, the patentee is not concerned with it. The groove of the patent is still the groove of the patent, although enlarged. It no more loses its identity by enlargement than a river does by the change of the volume, due to the flow and ebb of the tide, or by the shoaling or deepening of its channel by the wash of its current.

“The balls are no part of the groove, but something used with it. There is no thought of denying the right of a vendee to repair balls. His right is not limited to any size of ball. The balls may be replaced without thought of infringement of any patent right. To deny vendee the right to smooth up a groove is to deny him all right to make repairs to the patented features of what was sold to him. The right cannot be limited to the use of the same balls as before. The only limitation is that he may repair, but cannot make a new bearing out of the material of the old. What is the one and what the other the facts of each case must determine. The line, as before observed, is most difficult to draw in words of description; it is by no means so difficult to draw in fact.

“In the instant case our fact finding is that what defendant has done is to make repairs, and that it has not infringed upon the patent rights of plaintiff. The name given to anything is not necessarily indicative of what the thing is. A fact upon

which defendant lays much stress has some interest as a coincidence, but no other value. The fact referred to is that the plaintiff itself did what the defendant has done, and the department in charge of such work was called by plaintiff its 'Repair Department'. We attach as little importance to the distinction between repairing and selling second-hand bearings after they have been repaired."

In the case of *Ely Norris Safe Co. v. Mosler Safe Co.* (C. C. A. 2), 62 Fed. (2d) 524, the defendant was held not to have constructed or manufactured, but to have merely repaired a safe, thereby committing no infringement of plaintiff's patent. In the course of the opinion the pertinent facts and applicable law are stated as follows, l. c. 527:

"The second claimed infringement is by the Halifax safe. This safe was sold by the plaintiff in 1908 to the First Bank of Fallis, at Fallis, Oklahoma. Shortly thereafter it was burglarized. The insurance company refused to pay the loss, and a suit followed. A witness, an employee of the Mosler Safe Company, testified that, after the burglary, the safe was shipped to the Mosler Safe and Lock Company. It could not be unlocked when received and a hole was drilled in the back of the safe and a rod placed through it to trip the lock mechanism of the inner door. There is no evidence of a so-called explosion chamber. This safe was then resold to the Bank of Halifax, of Halifax, Pa., as a second-hand safe. The hole was drilled in 1911. In March, 1930, one of the employees of the York Safe and Lock Company saw this safe and recognized it as a safe body of plaintiff's construction bearing the same number as a safe which was sold to the First Bank of Fallis. It then contained a removable raid chest, and on the door of the inner chest

there appeared the name of Mosler. One of plaintiff's witnesses saw it in 1930, and stated that a hole had been drilled in the door and that a metal plug had been hammered into the hole. From this it is argued that it was reconstructed and sold by the defendant. It is said to be an infringement, but it does not appear when the hole was drilled or by whose authority or request it was drilled and whether prior to or after it was sold to the Bank of Halifax. It is quite apparent that when the locking device went wrong and it became necessary to drill the hole in the door to repair it, it was later plugged, but the defendant cannot be charged with this as constituting an act of infringement. The repair may be assumed to have been made on instructions from the bank. *It was not the construction of a safe. There is testimony that it is the practice of safe manufacturers to place their name upon second-hand safes when they sell them. This resale of a second-hand safe in the manner described and the repair necessarily made to adjust the locking device, first drilling a hole, cannot be regarded as an act of infringement.* We agree with the court below in holding it was not." (Italics supplied.)

In *Foglesong Machine Co. v. Randall Co.* (C. C. A. 6), 239 Fed. 893, the defendant, being the owner of a patented machine for the stuffing of horse collars, was accused of infringing the patent by making certain repairs upon the machine. The court found that certain parts of the machine were perishable in that they were subject to greater wear than other parts. In that connection the court said, l. c. 895:

"The question for decision is: Did the defendant repair or reconstruct the machine which it purchased from the Grand Rapids Company? In supplying a new hopper, stuffing rod nose, and disc, the defendant

merely returned to use the injured or lost portions of the mechanism. This constitutes repairing, and not reconstruction.”

At another point the court said, l. c. 896:

“The machine was not so broken and worn out as to require replacement. The wear and injury were but partial. Under such circumstances, repair is not reconstruction, but restoration, that the mechanism may be kept up to the full performance of its duty.”

In *Goodyear Shoe Machine Co. v. Jackson* (C. C. A. 1), 112 Fed. 146, it is said in the opinion by Colt, C. J., l. c. 151:

“Where the patent is for a machine, which commonly embraces the combination of many constituent elements, the question of infringement by the purchaser will turn upon whether the machine is only partially worn out or partially destroyed, or is entirely worn out, and so beyond repair in a practical sense. In the case of a patent for a planing machine composed of many parts it was held that the replacement of the rotary knives, ‘the effective ultimate tool’ of the machine, was repair, and not reconstruction, *Wilson v. Simpson*, 9 How. 109.”

A further statement of the principle involved, together with a citation of many cases, is found in *Miller Hatcheries v. Incubator Co.* (C. C. A. 8), 41 Fed. (2nd) 619.

In *State v. J. J. Newman Lumber Co.* (Miss.), 59 So. 923, the distinction between manufacture and repair is clearly stated by the Supreme Court of Mississippi as follows, l. c. 926:

“A reasonable definition may be given to ‘manufacturing’ (Century Dictionary) as the system of

industry which produces manufactured articles, and to 'manufacture' as the production of articles for use from raw or prepared materials, by giving to these materials new forms, qualities, and properties, or combinations, whether by hand labor or machinery, used more especially of production in a large way by machinery, or many hands working co-operatively. 'Repair' is to make whole or restore an article or thing to its completeness. In the general knowledge of the affairs of business and life, it will hardly be difficult to class those persons who are engaged in such employment."

Applying the principles announced and reiterated in the foregoing cases to the facts of the case at bar, it is clear that the injury to the used, second-hand armatures which the plaintiff acquired and rewound was but partial. Only the wire coils were injured or destroyed. They were not "entirely worn out, and so beyond repair in a practical sense" (*Goodyear Shoe Machinery Co. v. Jackson*, 112 Fed. 146, 151), is conclusively proved by the fact that the plaintiff did restore them to their former condition of usefulness by the simple expedient of installing the new coils. The basic thing or part is the core consisting of the shaft, commutator and laminated core, which was identified by Mr. Daniels, a witness for the plaintiff [R. 80].

"The Court: Often you would build it on—what do you call the basic thing, the coil?

"The Witness: The armature is the basic thing, and we would put new wires on it, and turn it."

The physical facts speak for themselves. This Court has before it a box of armatures, Defendant's Exhibit C, showing armatures in various stages of rewinding. These

exhibits themselves are the most eloquent testimony obtainable that the armatures before rewinding were not entirely worn out and were not beyond repair in any sense, but had sustained only partial wear or injury. These armatures were not “junk,” and had not been discarded by their former owners as is contended by the appellant. On the contrary, they had been carefully preserved and had been sent to this plaintiff either directly or through jobbers so that they might be rewound or exchanged for other armatures of a similar type which had already been rewound.

Harry E. Seneker, testifying for the plaintiff, when asked what percentage of the armatures were procured from jobbers, stated [R. 97]:

“A. Approximately 95 per cent.”

If these armatures were so far worn out and so beyond repair that they had ceased to have any value over and above the melting pot value of the metal contained in them, why did plaintiff pay an average of from fifty cents to one dollar for them? If the Court can draw upon its fund of common knowledge and take judicial knowledge of the fact that there is such a thing in the steel industry as scrap, then it must also know that steel scrap is regularly bought and sold as a commodity of commerce at a price of a few dollars per ton. The current price for scrap steel is now \$11.50 per ton, slightly more than a half cent per pound.

There was no direct evidence that the used, second-hand armatures which the plaintiff rewound were, prior to the rewinding, so worn out and beyond repair that they had ceased to be armatures. On the contrary, under the undisputed evidence in this case, it is conclusively proved

and established that these armatures had a commercial value to the plaintiff and to other concerns engaged in the rewinding business in excess of their "junk value." It is obvious that the comparatively great commercial value of used armatures in excess of the melting pot value of the metals contained therein is due entirely to the fact that these armatures may be restored to their former condition of usefulness and mechanical efficiency by a process of repair. This is the principle which underlies the decision of the Supreme Court in *Cadwalader v. Jessup & Moore*, 149 U. S. 350. In that case the Supreme Court was called upon to decide whether certain imports of old india rubber shoes were dutiable as crude india rubber or as articles composed of india rubber. The shoes were so worn as to be beyond repair and for that reason they had ceased to be shoes and were valuable only for the rubber which they contained. It is said in the opinion by Mr. Justice Blatchford at page 354:

"The uncontradicted testimony is to the effect that the only commercial use or value of the old india rubber shoes, or scrap rubber, or rubber scrap in question, is by reason of the india rubber contained therein, as a substitute for crude rubber; that the old shoes were of commercial use and value only by reason of the india rubber they contained, as a substitute for crude rubber, *and not by reason of any preparation or manufacture which they had undergone*; that they could not fairly be called 'articles composed of india rubber,' and as such dutiable at 25 per centum *ad valorem*; and that, although the shoes may have been originally manufactured articles composed of india rubber, they had lost their commercial value as such articles, and substantially were merely the material called 'crude rubber.' They were not india rubber

fabrics, or india rubber shoes, because they had lost substantially their commercial value as such.” (Italics supplied.)

The appellant herein compares the above case to the case at bar, stating that the india rubber shoes had lost their commercial value as such articles, and substantially were the material called “crude rubber”. It is agreed that they are correct in reference to the shoes, because they were not imported as used shoes to be repaired, but only for their value as crude rubber. In the instant case the armatures are repaired to restore them to their former condition of usefulness. If the plaintiff had converted the armatures into some other automobile part then there might be some color of right in the appellant’s contention; in fact, this action would never have been instituted.

The appellant bases practically its entire case upon the decision in the case of *Clawson & Bals v. Harrison*, 108 Fed. (2d) 991. In order to get a clear picture of this case it is necessary to refer to the findings of fact and conclusions of law as found by the trial court. This case is not published in the National Reporter System, but may be found in Commerce Clearing House, 1939 Standard Federal Tax Service, Vol. 4, Paragraph 9219. For the convenience of this Court the findings of fact and conclusions of law made and entered by the court are submitted in the appendix to this brief [App. p. 28].

Clawson & Bals had new connecting rod forgings made for them, which they machined and babbitted. During part of the period covered by their suit, they removed all marks of identification from rods manufactured by General Motors Corporation and subsidiaries. They also rebabbitted used and second-hand connecting rods. At

paragraph 10 of the findings of fact the trial court found:

“Plaintiff kept but one stock with respect to each number and had but one outright price with respect to the rods, irrespective of whether they were produced from entirely new castings or from scrap, and regarded the articles made from scrap as equivalent to any similar products made entirely from virgin metal. The rods made from scrap were in competition with similar products made entirely of virgin metal and were just as serviceable. They were held out for sale and sold on the same basis and under the same warranties as the connecting rods produced from entirely virgin forgings. In other words, plaintiff made no distinction between such connecting rods in the numbering, cataloging, selling, billing, advertising, shipping, labeling, pricing, marketing, quality, warranty, guaranty or otherwise.”

As stated before, Clawson & Bals dealt in three kinds of connecting rods; newly-manufactured ones, rebabbitted rods on which the identification marks had been removed and other rebabbitted rods. They at all times held themselves out as manufacturers, as in truth they were. As manufacturers they paid excise tax on all sales of rods, but did not include as part of the sale price the exchange value of the old rods received as part of the selling price. Later the Government assessed a total of \$54,232.02, representing tax and interest on the additional selling price as represented by the value of the old rods received in exchange. Immediately Clawson & Bals objected on the ground that they were only rebabbits of a part of the rods sold by them and that the additional tax paid by them of \$54,232.02 should be refunded as representing the tax on the sale of rebabbitted connecting rods.

It is submitted that the facts in the Clawson & Bals case are entirely different from the facts in the case at bar. Clawson & Bals did manufacture new connecting rod forgings from virgin metal, they removed identification marks from a part of the rods rebabbitted by them, they were manufacturers and held themselves out as such, whereas the appellee herein never manufactured an armature, or held itself out as a manufacturer, never removed any identification marks from the armatures and, in fact, never did more than repair used and damaged armatures.

The appellant also cites as authority *The King v. Bilt-rite Tire Co.*, 1937 Canadian Law Reports 1, and *The King v. Boulton, Ltd.* (1938), 3 Dominion Law Reports 664. However, it is contended by appellee that our courts must give precedent to the cases decided in our own country and must consider as law the overwhelming authorities therein established before resorting to cases decided in foreign courts.

In view of the uncontradicted testimony in the case at bar that the used, second-hand armatures which plaintiff acquired and rewound, by reason of the preparation and manufacture which they had previously undergone, had a commercial value as armatures which was far in excess of the junk value of the metals therein contained. It is respectfully submitted that the findings and judgment of the learned trial court were correct and should be affirmed.

II.

The Rewinding of Armatures Has Been Specifically Held in Other Cases Not to Constitute Manufacturing.

The applicability of the tax imposed by Section 606(c) of the Internal Revenue Act of 1932 to the sale of rewound automobile generator armatures has been decided in favor of the taxpayer by the District Courts of the United States in two other cases.

The first such case was *Monteith Bros. Company v. United States*, before the Hon. Thomas W. Slick, of the Northern District of Indiana. No opinion was delivered by the court and the case is not published in the National Reporter System. The findings and judgment of the court may be found, however, in *Commerce Clearing House*, 1936 Standard Federal Tax Service, Vol. 4, paragraph 9492; and for the convenience of this Court there is submitted an appendix to this brief, in which are printed in full the findings and judgment of the court in the *Monteith* case [App. p. 1]. Judge Slick found and held that the sale of rewound armatures did not come within the purview of Section 606(c) of the Internal Revenue Act of 1932. This case also embraced the sale of rebuilt generators and rebabbitted connecting rods and decided their taxability in the same manner.

In *Becker-Florence Co. v. United States*, Hon. Albert L. Reeves of the Western District of Missouri, on December 27, 1938, held that the tax imposed by Section 606(c) of the Internal Revenue Act of 1932 was not applicable

to the sale of rewound and reconditioned automobile armatures and generators. The opinion and decision of the court in that case are not published in the National Reporter System, but may be found in Commerce Clearing House, 1939 Standard Federal Tax Service, Vol. 4, paragraph 9259, and for the convenience of this Court are submitted in the appendix to this brief [App. p. 21]. Judge Reeves, recognizing the necessity of equality and uniformity in the administration of taxing statutes, said in the course of his opinion:

“To give the statutes the meaning contended for by the government would involve endless complications as affecting dealers, garage owners and repair men in general. No definite line could well be drawn and twilight zones would develop so frequently and from so many angles that a just and fair and practical enforcement of the law would become impossible.”

This same section of the Internal Revenue Act of 1932 was also called into question in five cases involving the taxability of the sales of rebabbitted connecting rods, which were decided by the District Court in favor of the taxpayer and against the government.

The first of these cases was *Hempy-Cooper Mfg. Co. v. United States*, before the Hon. Merrill E. Otis, of the Western District of Missouri. The opinion of Judge Otis in that case is not published in the National Reporter System, but may be found in Commerce Clearing House, 1937 Standard Federal Tax Service, Vol. 4, paragraph 9421. For the convenience of this Court the opinion of Judge Otis and the findings of fact and conclusions of law made and entered by the court are submitted in the appendix to this brief [App. p. 5].

In the *Hempy-Cooper* case Judge Otis specifically held that whether a given operation constituted manufacture or repair is to be determined by what is done during the process. In the course of the opinion it is said:

“The connecting rod is the same connecting rod after repairing is done as it was before. It has not lost its identity. Whether a given operation is manufacturing or repair of something that already has been manufactured does not depend upon what is done with the thing after it has been repaired or after it has been worked upon. It depends upon what has been done. If it is merely a repair operation, if it is handed back to some other person who has brought it for the purpose of having it repaired, it is still nothing but a repair operation if, after the work has been done, it is laid upon the shelf and sold the next day or the next week or the next year. In neither case is the identity of the thing lost.”

Another case in which it was held that the rebabbitting of connecting rods does not constitute manufacture is *Bardet v. United States*, decided by Hon. Fred Louderback of the Northern District of California on May 18, 1938. The court delivered no opinion and the case is not published in the National Reporter System, but may be found in Commerce Clearing House, 1938 Standard Federal Tax Service, Vol. 4, paragraph 9530. For the convenience of this Court the findings of fact and conclusions of law in that case are submitted in the appendix to this brief [App. p. 14].

The third case in which it was held that the rebabbitting of connecting rods does not constitute manufacturing is *Con-Rod Exchange, Inc., v. Henricksen*, 28 Fed. Supp. 924, decided by Hon. Leon R. Yankwich, August 17,

1939. In the course of the opinion Judge Yankwich stated:

“We do not have here a process of manufacture or production of an article of commerce. We have merely a process of renewing, for further use, a standard article of commerce—an automobile part—by resurfacing a worn-off portion of it with a thin layer of metal alloy, which in all probability, does not enhance its weight by more than a few ounces. ‘Manufacture is transformation—the finishing of raw materials into a change of form for use.’ *Kidd v. Pearson*, 1888, 128 U. S. 1, 20, 9 S. Ct. 6, 10, 32 L. Ed. 346. Here there is no change of form, identity or function. The rehabilitated article is not a new article, but one which has been restored to its original shape and use by the mere resurfacing of the worn-off surface on part of it. * * *

* * * * *

“For the function of repairing is to make usable an article which without it could not be used. A frying pan without a handle is useless as a frying pan. So is a chair in which the seat or a leg is broken. The workman who adds a new handle to a pan, or repairs the seat or leg of a chair by replacing the worn-out portion with new material, in effect, takes something out of a scrap heap or a junk pile and restores it to usefulness.

“Still we would be doing acts of violence to the English language if we called these acts of repairing acts of manufacture.”

In *Moroloy Bearing Service of Oakland, Ltd., v. United States of America*, Hon. Martin I. Welsh of the Northern District of California, Southern Division, decided July 16, 1940, likewise held that the manufacturer’s excise tax on the sale of automobile parts did not apply to the

sale of rebabbitted connecting rods. At the present time the opinion in that case is not published in the National Reporter Service, nor has it appeared in the Federal Tax Service. For the convenience of this Court a copy of the opinion by Judge Welsh is submitted in the appendix to this brief [App. p. 37]. The following excerpts from the opinion are particularly pertinent here:

“The evidence shows the connecting rods which plaintiff rebabbitted were in their original state manufactured by others, and only came into the hands of the plaintiff when certain parts of them became defective either from the burning out of the babbitt through friction while in operation, or through lack of proper lubrication, or on account of other causes.

“In no manner did the evidence show the plaintiff manufactured the connecting rods themselves, but, on the contrary, the evidence clearly showed that plaintiff was engaged in the repair and rehabilitation of connecting rods manufactured by others, when they became outworn and defective from use.

“In Bouvier’s Law Dictionary (Rawl’s Revision, Unabridged) the words manufacture and repair, when used as verbs are defined as follows:

“Manufacture—to make or fabricate raw materials by hand, art, or machinery, and work into forms convenient for use.

“Repair—to restore to a sound state after decay, injury, delapidation, or partial injury.’

“It would be just as logical to hold that a shoe cobbler was a manufacturer of shoes that were brought to him for repair because he nailed or sewed soles and heels on the shoes in the process of repairing them, as to hold that a mechanic was a manufacturer of connecting rods because he rehabilitated

them. The process is a repair in the one case, just as it is in the other. That plaintiff is repairing its own rods for sale, whereas the shoe cobbler is repairing shoes for others is not significant. Whether or not a process is one of repair does not depend on the condition of the title to the repaired article.”

The most recent case in favor of the taxpayer, deciding the taxability of rebabbitted connecting rods was *J. Leslie Morris Company, Inc. v. United States of America*, decided July 24, 1940, by the Hon. Paul J. McCormick, District Judge. This case is not reported at the present time, accordingly a copy of the opinion of Judge McCormick is submitted in the appendix to this brief [App. p. 39].

In the armature and generator cases heretofore cited the mechanics of the repairing were practically identical with the facts in the case at bar. The last five cases cited differ only as to the parts involved; the mechanical operations are, of necessity different, but are still repairs of used parts. In all seven cases the repairs commenced with certain used parts; when the repairing was completed the used parts were still present. They had not lost their identity during the process. The results of the process in all of the cases were identical.

The first case involving excise tax on repaired automobile parts under the Internal Revenue Act of 1932 was *Skinner v. United States*, 8 Fed. Supp. 999. In this case the court held that the manufacturer's excise tax imposed by Section 602 of the Internal Revenue Act of 1932 did not apply to retreaded tires, because retreading is not manufacturing, but is merely repair. At page 1004 it is stated in the opinion:

“The court is of the opinion that plaintiff is not a manufacturer or producer within the meaning of

the statutes and regulations. He is, as stated by the witness Roper in the record (page 9), 'a repairman' and should be classified and by the court is classified as such."

It is pointed out that the Bureau of Internal Revenue, in S. T. 648, Internal Revenue Bulletin, Cumulative Bulletin XII-1, page 384, has itself adopted, and is still following the test laid down in the *Skinner* case. That test is whether the identity of the old tire is lost in the process. If so, it is manufacturing; if not, it is merely repairing [App. p. 44].

Applying the test laid down in the *Skinner* case to the case at bar, it is readily seen that no tax should attach upon the sale of the armatures rewound by appellee. To do otherwise would be to perpetrate the greatest inequality in the administration of the tax laws. This point of identity was covered at the trial of this case by Mr. Daniels, where he testified on direct examination [R. 75-76]:

"Q. When an old armature was received for rewinding, were the component parts of the armature separated?

"The Witness: The only part that was removed was the winding of the wire from the armature.

"Q. Were any steps taken to removed the existing identity that might be on the armatures?

"The Witness: No, there was no identification removed."

The unanimity of opinion of the courts in the seven cases above presented which deal directly with the question of the taxability of the sale of rebuilt or repaired automobile parts is not without significance, particularly since they are directly in line with the other authorities herein cited.

III.

Taxing Statutes Must Be Strictly Construed and Should Be So Construed as to Produce Uniformity and Equality in Their Application. Their Provisions Cannot Be Extended by Implication.

There was no dispute at the trial of this case as to the methods employed by the plaintiff in rewinding automobile generator armatures. In fact the method was covered by a series of 21 pictures and an explanatory statement for each, which were introduced as a joint exhibit. (Joint Ex. No. 1.)

The government produced no direct evidence whatever that the rewinding of armatures is a manufacturing process or that the rewinding of armatures constitutes the manufacture of armatures.

Being totally without any direct evidence that rewinding is a manufacturing process, the government apparently attempted to prove its case by the use of a syllogism which runs something like this: All large establishments employing many men, using many machines and turning out a large volume of work, doing business on a large scale and publishing catalogues in which their product is described, are manufacturing establishments; plaintiff has all these characteristics; therefore, plaintiff is a manufacturing establishment. The major premise of this syllogism is, of course, untrue, and the conclusion is, therefore, completely false. Size and extent and volume of business do not constitute the test of manufacture. It is common knowledge that there are many machine shops much larger than plaintiff's which manufacture nothing, but are engaged only in repair work.

Much emphasis was also placed on the fact that the appellee was incorporated "to carry on the business of

manufacturing and assembling armatures * * * and to market them.” [R. 106.] This corporation was organized in 1922 [R. 57], ten years before the enactment of the Revenue Act of 1932. The articles of incorporation were so broad that appellee could do practically anything that an individual could do. [R. 106-109.] The test is not what the articles of incorporation recite, but what was actually done during the period involved.

If the taxing statute here involved is to be applied and administered by testing whether a company is a manufacturer or a repairman by determining whether it does business on a large scale or on a small scale, and whether it employs many men or few men, and whether its articles of incorporation authorize it to manufacture or not, then the administration of the taxing statute will result in the greatest inequality and lack of uniformity. The rewinder who sells several thousand armatures a month will be taxed because he is large and the rewinder who sells only a few armatures a month will not be taxed because he is small. The rewinder empowered to manufacture armatures will be taxed because of those powers, even though he is not exercising them.

The appellee herein distributed printed catalogues, wherein were listed the armatures sold, showing the original manufacturer's name and parts number, in addition to appellee's code number. [R. 67-73.]

The mere fact that ownership of the armatures was vested in the appellee does not affect its status as a repairer. There is nothing to prevent appellee from acquiring title to used armatures or other automobile parts and repairing them before offering them for sale. Certainly there is no conflict here between the repairman being also the owner and vendor or only the repairman of the used armatures for others.

The true test, and the only test, is whether the rewinding process itself results in the creation of a new article, or whether it only accomplishes the restoration of an article already created. That is the test which can be applied to every rewinder and will result in absolute equality and uniformity of administration of the taxing statute.

In *City of Louisville v. Zinmeister* (Ky.), 222 S. W. 958, l. c. 959, the Supreme Court of Kentucky said:

“In the recent case of *Lorrillard Co. v. Ross, Sheriff*, 183 Ky. 217, 209 S. W. 39, we held that the word ‘manufacture,’ in the sense in which it is employed in the statutes quoted above, does not import the means or methods employed, or the nature or number of processes resorted to, or the size of the factory or the number of hands it employs, or the volume of machinery in use, but the result accomplished, whether the article is manufactured or not.”

It is elementary that taxing statutes are to be construed strictly in favor of the taxpayer. This means that the tax must be based upon express statutory authority and cannot be imposed by implication. In *Hartmanft v. Wiegmann*, 121 U. S. 609, it is said in the opinion by Mr. Justice Blatchford, at page 616:

“We are of the opinion that the decision of the Circuit Court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, ‘as duties are never imposed on a citizen upon vague or doubtful interpretations.’ *Powers v. Barney*, 5 Blatchf. 202; *United States v. Isham*, 84 U. S., 17 Wall. 496, 504; *Gurr v. Scudds*, 11 Exch. 190, 191; *Adams v. Bancroft*, 3 Summ. 384.”

In *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498, it is stated in the opinion by Mr. Justice Butler, at page 508:

“It is elementary that tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import. Doubts must be resolved against the government and in favor of taxpayers. *United States v. Merriam*, 263 U. S. 179, 188, 29 A. L. R. 1547, 44 S. Ct. 69; *Bowers v. New York & A. Lighterage Co.*, 273 U. S. 346, 350, 47 S. Ct. 398.”

In *Erschine v. United States* (C. C. A. 9), 84 Fed. (2d) 690, 691, it is said:

“Such revenue acts must be construed strictly in favor of the appellant sought to be charged as importer. He is ‘entitled to the benefit of even a doubt.’ Tariff Act 1897, 30 Stat. 151; *United States v. Riggs*, 203 U. S. 136, 1939, 27 S. Ct. 39, 40, 51 L. Ed. 127; *Hartranft v. Wiegmann*, 121 U. S. 609, 616, 7 S. Ct. 1240, 30 L. Ed. 1012; *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498, 508, 52 S. Ct. 260, 76 L. Ed. 422.”

In *Bankers Trust Co. v. Bowers* (C. C. A. 2), 295 Fed. 89, 96, it is said that the construction placed on a statute should avoid unjust consequences unless the act compels such a result. This is particularly true of a taxing statute where absolute uniformity and equality are to be preserved.

In *Alaska Consolidated Canneries v. Territory of Alaska* (C. C. A. 9), 16 Fed. (2d) 256, 1.c.258, it is said in the opinion by Rudkin, C. J.:

“Of course there is a presumption that laws, and especially tax laws, will have a prospective operation

only; but there is a like presumption that they are intended to operate uniformly and equally upon all and, in the end, the question is one of legislative intent.”

And in *Atlantic Pipe Line Company v. Brown County*, 12 Fed. Supp. 642, Judge Atwell said, at page 646:

“Discrimination is synonymed with distinction. It is the antithesis of fairness. It means, in this case, the demand from the complainant of a higher rate or of a higher value, and this disadvantage involves a correlative discrimination. Taxation must be uniform and without such favoritism.”

The contention of the government that some distinction may be made predicated upon the fact that the plaintiff is a large operator would seem to be specifically refuted by the case of *Spreckels Sugar Refining Co. v. McClain* (C. C. A. 3), 113 Fed. 244, opinion by Circuit Judge Dallas. In that case the statute imposed an excise tax on all gross receipts in excess of the sum of \$250,000.00 per annum. A monthly return was required by the law, which did not specifically require anything but an annual payment of tax. The Spreckels Company filed a return for the first month, showing receipts in excess of the sum of \$250,000.00, and it was contended that the law should be construed so as to force the company to pay the tax monthly. The court held that the construction of the act contended for by the government was “so questionable as to render it inadmissible to impose a duty upon a citizen,” citing the *Hartranft* case, and further held that such an inequality in the administration of the law could not be imposed upon the plaintiff simply because the returns were so large that its first monthly return

exceeded \$250,000.00. The court said in the opinion, 1.c.247:

“We have already pointed out that it is not necessary to put an interpretation upon this section which might involve such inequality in its administration and, except by necessity, no such interpretation could be justified.”

The opinion of the learned trial court in this case [R. 11-25] discloses that in every respect the principles announced in the foregoing authorities were closely adhered to. After carefully reviewing the evidence which had been adduced at the trial the court stated [R. 24]:

“If a person with mechanical skill were asked to rewind an armature, by one who paid him the value of his labor and materials, would the process be one of manufacturing? I do not think so. The fact that this company does this on a large scale does not alter the situation. In neither case are we dealing with a ‘manufacturer’ or ‘producer’.”

On the question of the wording of the articles of incorporation, on which the appellant lays great emphasis, the trial court said [R. 105]:

“Under these articles, they can sell everything but liquor. They can do bill-posting, and everything else. I don’t know what good this will do.”

Thus it can be seen that the court weighed the very points which are here urged by the appellant and specifically decided that large size of the plant, number of employees and authorization of the articles of incorporation would not constitute the test of the application of the statute.

It is a cardinal principle of tax law that any doubt shall be resolved against the taxing authority. To do

otherwise in this action would be to work great hardship upon the appellee and controvert all established law on that point.

In deciding *J. Leslie Morris Company, Inc., v. United States of America* Judge McCormick laid special emphasis on this question of interpretation of statutes [App. p. 39].

The Bureau of Internal Revenue has no authority to attempt to amend any congressional act or extend the meaning thereof by regulation. This principle is clearly pointed out by the Supreme Court in *Koshland v. Helvering*, 298 U. S. 441, 446.

Had Congress intended the tax herein involved to attach to the sale of repaired automobile parts such provision would have been put in the Internal Revenue Act of 1932. Failure to put such provision in that act shows clearly that it intended for the tax to attach to the sale of only newly-manufactured parts.

Plaintiff respectfully submits that, in the public interest, as well as to prevent injustice to this plaintiff, the judgment of the learned trial court should be sustained to the end that fairness, equality and uniformity in the administration and collection of federal manufacturer's excise tax shall be insured.

Conclusion.

It is submitted that the evidence supports the findings of fact, conclusions of law and opinion of the trial court, and that the judgment should be affirmed.

Respectfully submitted,

DARIUS F. JOHNSON,
Attorney for the Plaintiff-Appellee.

July, 1940.

APPENDIX TO APPELLEE'S BRIEF.

(Reprinted from Commerce Clearing House 1936 Standard Federal Tax Service, Vol. 4, Para. 9492.)

Monteith Brothers Company, plaintiff, v. United States of America, defendant.

District Court of the United States for the Northern District of Indiana, South Bend Division. October Term, 1936. Judgment entered October 5, 1936.

Excise tax on automobile parts and accessories. Since not specifically mentioned under Sec. 606(c) of the 1932 Act, rewound, rebuilt, and repaired armatures, and rebuilt and repaired generators, and rebabbitted, repaired and rebuilt connecting rods are held not taxable as automobile parts and accessories under that section.

See: Reg. 46, Art. 41, at Para. 2614, Vol. 3.

SLICK, D. J.: Come now the parties by counsel, and this cause being at issue is submitted to the Court for trial without the intervention of a jury, and the parties having filed their written stipulation wherein they agreed that all of the allegations in plaintiff's complaint may be taken by the Court as true and proven, except the allegation wherein the plaintiff charges that it is not a manufacturer or producer and the Court having taken the admitted allegations of said complaint as true and proven and the Court having heard the argument of counsel and the Court being duly advised in the premises finds:

(FINDINGS)

1. Monteith Brothers Company, plaintiff herein, is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana and during the times hereinafter mentioned had its office and prin-

cipal place of business in the City of Elkhart, State of Indiana, and within this judicial district.

2. Plaintiff made and filed its manufacturer's excise tax in compliance with the demand of the Collector of Internal Revenue of defendant under Paragraph C, Section 606, of the Revenue Act of 1932, for the sum of Five Hundred (\$500) Dollars and because of said demand did pay to the United States Collector of Internal Revenue said sum of Five Hundred (\$500) Dollars on the 27th day of September, 1934.

3. On the 15th day of November, 1934, plaintiff filed its claim for refund of said Five Hundred (\$500) Dollars manufacturer's excise tax so paid to the Collector of Internal Revenue of the United States and asked for a refund and repayment to plaintiff of said sum of Five Hundred (\$500) Dollars for the reason that no tax had accrued against the plaintiff under Section 606 of the Revenue Act of 1932; that said demand for refund was by the Collector of Internal Revenue of the United States denied and rejected on the 26th day of June, 1935. That said sum of Five Hundred (\$500) Dollars so paid on said alleged claim of the defendant was paid because of the demand for payment by defendant under and pursuant to Section 606 of the Revenue Act of 1932, which tax was not assessable for the reason that plaintiff did not come within said Section 606 of said Revenue Act of 1932.

4. That for more than ten (10) years last past and next preceding the filing of this action plaintiff was engaged at Elkhart, Indiana, in the business of rewinding, rebuilding and repairing armatures, rebuilding and repairing generators, rebabbitting, repairing and rebuilding connecting rods for automobiles; that said rewound, rebuilt and repaired armatures, rebuilt and repaired gener-

ators, rebabbitted, repaired and rebuilt connecting rods so handled by the plaintiff were for many years preceding the passage of the Revenue Act of 1932 extensively advertised and were well known commercial commodities in the automobile industry.

5. That the plaintiff has not included any of said sum of Five Hundred (\$500) Dollars for recovery of which this action is filed, it disposed of its said product described in said complaint and has not collected the same or any part thereof from any of plaintiff's customers, nor from any other source.

6. That said rewind, rebuilt and repaired armatures and rebuilt and repaired generators and rebabbitted, repaired and rebuilt connecting rods as described in plaintiff's complaint and on which said tax was assessed and paid did not, nor did any of the same come within the purview of Paragraph C, Section 606 of the Revenue Act of 1932 for the reason that none of said articles described in plaintiff's complaint and on which said taxes were assessed and paid are spark plugs, storage batteries, leaf springs, coils, timers or tire chains. That the levying of a tax upon the rewind, rebuilt and repaired armatures, rebuilt and repaired generators and rebabbitted, repaired and rebuilt connecting rods, or either of them, as set out in plaintiff's complaint is an unlawful assessment; and levying and collecting of such tax. That no tax under Section 606 of the Revenue Act of 1932 can be imposed upon the sale of rewind, rebuilt and repaired armatures, rebuilt and repaired generators and rebabbitted, rebuilt and repaired connecting rods, because the same do not come within the Revenue Act of 1932.

7. That on the 21st day of July, 1934, the Collector of Internal Revenue for the defendant, The United States

of America, notified plaintiff in writing that the Internal Revenue Department of defendant, had pursuant to Paragraph C, Section 606 of the United States Revenue Act of 1932 assessed a tax against plaintiff in the sum of Eight Thousand Six Hundred Twenty-two and 1/100 (\$8,622.01) Dollars as a manufacturer's excise tax claimed by the defendant covering the period from June 21, 1932, down to and including March 1, 1934, together with interest thereon in the sum of One Thousand Seventy-one and 93/100 (\$1,071.93) Dollars, making a total tax and interest claimed by the defendant for said period from June 21, 1932 to March 1, 1934 of Nine Thousand Six Hundred Ninety-three and 94/100 (\$9,693.94) Dollars and at said time the Internal Revenue Department of the defendant demanded payment of said sum of money. The Court further finds that in pursuance of such notice and demand of the defendant the plaintiff herein has paid to the Collector of Internal Revenue of the defendant for the use and benefit of the defendant the sum of Six Thousand Five Hundred Sixty-four and 64/100 (\$6,564.64) Dollars:

8. That said taxes so paid by the plaintiff to the defendant as in its complaint set out were paid upon an illegal assessment and that said sum of Five Hundred (\$500) Dollars so paid by plaintiff to the Internal Revenue Collector for the defendant on September 27, 1934, should be paid by the defendant to the plaintiff.

It is therefore considered, adjudged and decreed by the Court that plaintiff have and recover of and from the defendant the sum of Five Hundred (\$500) Dollars, together with its costs and charges paid, laid out and expended, to which judgment of the Court the defendant, United States of America, at the time duly excepted.

(Reprinted from Commerce Clearing House, 1937 Standard Federal Tax Service, Vol. 4, Para. 9421)

Hempy-Cooper Manufacturing Company, a corporation, Plaintiff v. United States of America, Defendant.

District Court of the United States for the Western District of Missouri, Western Division. No. 9654. May 6, 1937.

Excise Tax on automobile parts and accessories.—Upon the facts, taxpayer is held to have been engaged in the repair of connecting rods and not the manufacture thereof, so that it was not taxable on their sale.

See Reg. 46, Art. 41 at 373 CCH Para. 2614.175.

Messrs. Delos C. Johns and W. B. Cozad, of the firm of Morrison, Nugent, Wylder and Berger, attorneys for plaintiff. Mr. Thomas A. Costolow, Assistant United States District Attorney, for defendant.

Before MERRILL E. OTIS, District Judge.

(QUESTION)

THE COURT: The question which this case presents is essentially a question of fact. The plaintiff sold automobile connecting rods. The tax which was imposed, a refund of which the plaintiff seeks in this case, was imposed upon the theory that the plaintiff manufactured the connecting rods which it sold. If it did manufacture them, it was properly taxed. It did no more than sell connecting rods which it had not manufactured but had only repaired, it was improperly taxed. The question then is, was that which the plaintiff did the manufacture of connecting rods or only the repair of connecting rods?

To my mind this question of fact seems most simple and most easy to answer. Perhaps its apparent simplicity covers up greater difficulties than I observe.

(REPAIR V. MANUFACTURE)

Learned counsel for the defendant concedes that if an individual were to take a connecting rod from his automobile, part of which was so worn that it was no longer serviceable until it was repaired, that if the person in the shop to which he took this connecting rod did exactly what the plaintiff did with the connecting rods on which the plaintiff worked, learned counsel for the defendant concedes that would be no more than a repair of the connecting rod, and that if that was the business in which the plaintiff was engaged, it was not subject to this tax that was imposed in this case. I think counsel for the defendant is right in saying that what would have been done in that situation by the shop owner was only a repair of the connecting rod which had been brought to him. There can be no argument about that. That is too plain for argument.

The connecting rod is the same connecting rod after repairing is done as it was before. It has not lost its identity. Whether a given operation is manufacture or repair of something that already has been manufactured, does not depend upon what is done with the thing after it has been repaired or after it has been worked upon. It depends upon what has been done. If it is merely a repair operation if it is handed back to some other person who has brought it for the purpose of having it repaired, it is still nothing but a repair operation if, after the work has been done, it is laid upon the shelf and sold the next day or the next week or the next year. In neither case is the identity of the thing lost.

(IDENTITY NOT LOST)

It seems to me that counsel for the defendant, as I indicated when he was arguing the matter, has confused a conception of a change of identity with a loss of marks of identification. If one takes a connecting rod and throws it into a pile of connecting rods in which there are 10,000 others, the mere fact that he can not again pick out that identical connecting rod which he threw into the pile of connecting rods because it has no marks upon it by which it can be identified, does not mean that its identity has been lost. Its identity has not been lost; it is still the same connecting rod that it was when it was thrown into the pile of connecting rods. That is true as to each of the connecting rods upon which the plaintiff did some work. Each of them was a connecting rod before the work was begun, and after the work, which made the connecting rod again useful and serviceable, was finished—it was the same connecting rod that it was before. Its identity had not been lost and had not been changed.

(CONCLUSION)

I am not able to reach any other conclusion than that all the plaintiff did was the repair of connecting rods and not the manufacture of connecting rods.

I have read through the requested findings of fact and conclusions of law. They follow the stipulation of facts, with certain additional findings that the evidence here presented today supports. The conclusions of law requested are those which I have suggested in this short oral opinion. The requested findings of fact and conclusions of law are adopted by the Court. To each of the conclusions of law the defendant is allowed an exception.

(Which said findings of fact and conclusions of law so adopted by the Court are in words and figures as follows:)

FINDINGS OF FACT

1. The plaintiff, Hempy-Cooper Manufacturing Company, is, and at all times involved in this suit was, a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, with its principal office and place of business in Kansas City, Jackson County, Missouri.

2. Prior to the 25th day of February, 1936, the defendant, acting by and through the Bureau of Internal Revenue of the Treasury Department and the Collector of Internal Revenue for the 6th District of Missouri, determined that there were due from the plaintiff, pursuant to the provisions of paragraph (c) of Section 606 of the Revenue Act of 1932, certain excise taxes upon the sale by plaintiff of certain automobile parts or accessories, to-wit, connecting rods in the sum of \$1,030.87; and pursuant to such determination the defendant assessed said taxes, or caused the same to be assessed, against the plaintiff, and the Collector of Internal Revenue for the 6th District of Missouri made demand upon plaintiff for the payment of said taxes, together with penalty and interest thereon in the sum of \$190.78, making a total assessment of \$1,221.65. The plaintiff, pursuant to said assessment and demand, paid to said Collector of Internal Revenue for the 6th District of Missouri, the aforesaid sum of \$1,221.65, on the 25th day of February, 1936.

3. Thereafter, and prior to the 20th day of June, 1936, the defendant acting by and through the Bureau of Internal Revenue of the Treasury Department and the Collector of Internal Revenue for the 6th District of Mis-

souri, determined that there were due from the plaintiff, pursuant to the provisions of paragraph (c) of Section 606 of the Revenue Act of 1932, certain excise taxes upon the sale by plaintiff of certain automobile parts or accessories, to-wit, connecting rods, in the sum of \$360.07; and pursuant to such determination the defendant assessed said taxes, or caused the same to be assessed, against the plaintiff, and the Collector of Internal Revenue for the 6th District of Missouri made demand upon plaintiff for the payment of said taxes, together with penalty and interest thereon in the sum of \$36.87, making a total assessment of \$396.94. The plaintiff, pursuant to said assessment and demand, paid to said Collector of Internal Revenue for the 6th District of Missouri the aforesaid sum of \$396.94, on the 20th day of June, 1936.

4. The excise taxes so assessed against and collected from, the plaintiff, as set forth in the preceding paragraphs numbered 2 and 3 hereof, were in respect of sales of certain automobile parts or accessories, to-wit, connecting rods, made by plaintiff during the period beginning with the month of June, 1932, and ending with the month of March, 1936.

5. The Collector of Internal Revenue for the 6th District of Missouri paid and remitted to the defendant said excise taxes and penalty and interest thereon so assessed against and collected from, the plaintiff, as aforesaid, and the defendant received and still retains the same.

6. On the 20th day of July, 1936, the plaintiff filed with the Collector of Internal Revenue for the 6th District of Missouri its claim for refund of the aforesaid excise taxes and penalty and interest thereon, assessed against, and collected from the plaintiff as hereinbefore set forth, in the aggregate amount of \$1,618.59. Said

claim was made and duly filed upon the official form prescribed therefor by the Treasury Department of the United States and was so filed within four years after the date of payment of said taxes, and said claim set forth the reasons for, and the grounds supporting, the refund of said taxes.

7. Thereafter, and on the 30th day of October, 1936, the Hon. Guy T. Helvering, Commissioner of Internal Revenue of the United States, acting by and through the Hon. D. S. Bliss, Deputy Commissioner of Internal Revenue, rejected and disallowed said claim for refund, and notified the plaintiff of such rejection and disallowance by letter signed by said Deputy Commissioner, dated the 30th day of October, 1936, and sent to plaintiff by registered mail.

8. The plaintiff did not include the aforesaid excise taxes in the price of the articles with respect to which said taxes were imposed; and plaintiff did not collect the amount of said taxes, or any part thereof, from the vendee or vendees of the articles in respect of which said taxes were imposed. The burden of said taxes was borne solely and exclusively by the plaintiff, and the burden of none of said taxes was passed on by the plaintiff to its customers or vendees.

9. All of the aforesaid excise taxes were assessed and imposed in respect of sales by plaintiff of rebabbitted connecting rods. All of said connecting rods were originally manufactured by persons, firms or corporations other than plaintiff and before their acquisition by plaintiff had been used as operating parts of automobile motors, and by reason of such use the babbit metal bearings constituting parts of said rods were worn, chipped, roughened and otherwise impaired.

10. Plaintiff imported none of said connecting rods in respect of which said excise taxes were assessed, but obtained all thereof from sources within the United States. At no time has plaintiff imported, nor does it now import, any automobile parts or accessories whatsoever.

11. The rebabbitting process to which the above mentioned used and second-hand connecting rods were subjected in plaintiff's shop consisted of melting and removing therefrom the old, worn, babbitt metal bearings and of casting therein new babbitt metal bearings and grinding, polishing and grooving the same so as to make said rods again suitable for use as operating parts of automobile motors.

12. The babbitt metal bearings contained in the connecting rods involved in this suit were of inconsequential size and bulk compared with the total size and bulk of the connecting rods.

13. The connecting rods which were rebabbitted by plaintiff, and in respect of which the excise taxes involved in this suit were imposed, did not lose their identity as connecting rods during, or as a result of, the rebabbitting process in plaintiff's shop.

14. None of the identifying symbols, trade-marks, numbers or other identifying data appearing on said connecting rods were removed, marred or obliterated during, or as a result of, the rebabbitting process in plaintiff's shop, but on the contrary, all such identifying numbers and data were left intact.

15. A rebabbitted connecting rod is a second-hand connecting rod; and all of the connecting rods which were rebabbitted by plaintiff, and in respect of which the

taxes involved in this case were imposed, were second-hand connecting rods when sold by plaintiff after the same were rebabbitted.

16. The arrangement under which plaintiff kept on hand and in stock a supply of rebabbitted connecting rods of various kinds and makes was a matter of convenience to the plaintiff and its customers so that the customers of plaintiff, by exchanging their rods, used rods for rebabbitted rods and paying a consideration in cash for the rebabbiting, could obtain prompt delivery of rebabbitted rods without waiting for the actual rebabbiting process to be completed upon the customers' own rods.

17. Rebabbitted connecting rods were widely known and used in the automobile industry for many years prior to the enactment of the Revenue Act of 1932, including Section 606 thereof, and there were many persons, firms and corporations in various parts of the United States engaged in the business of rebabbiting connecting rods at the time of enactment of the Revenue Act of 1932, and for many years prior thereto.

18. The rebabbiting process performed by plaintiff upon the connecting rods in respect of which the excise taxes involved in this case were imposed constituted the repair, rehabilitation or reconditioning of used and second-hand connecting rods, and did not constitute the manufacture or production of connecting rods.

19. The plaintiff at no time manufactured, produced, or imported any automobile parts or accessories whatsoever.

20. The sales of rebabbitted connecting rods in respect of which the excise taxes involved in this case were imposed did not constitute the sales of automobile parts or accessories by the manufacturer, producer or importer.

CONCLUSIONS OF LAW

1. The plaintiff has complied with all statutory conditions constituting conditions precedent to the institution and maintenance of this suit.

2. The plaintiff is not, and was not during the times involved in this suit, the manufacturer, producer or importer of automobile connecting rods or of any automobile parts or accessories whatsoever within the meaning of Section 606 of the Revenue Act of 1932.

3. The tax imposed by Section 606 (c) of the Revenue Act of 1932 applies only to sales of automobile parts or accessories when sold by the manufacturer, producer or importer.

4. The excise tax imposed by Section 606 (c) of the Revenue Act of 1932 does not apply to sales of rebabbitted automobile connecting rods by one who acquires such rods second-hand and rebabbits the same, and who neither manufactures, produces nor imports any other automobile parts or accessories.

5. In holding and determining that the tax imposed by Section 606 (c) of the Revenue Act of 1932 applied to sales of rebabbitted connecting rods by plaintiff during the period beginning with the month of June, 1932, and ending with the month of March, 1936, the Commissioner of Internal Revenue has exceeded the authority granted him under the Internal Revenue Act of 1932.

6. Under the evidence and the law the plaintiff is entitled to judgment against defendant in the sum of \$1,618.59.

7. The plaintiff is not entitled to recover interest on said sum of \$1,618.59.

Judgment for the plaintiff, the formal judgment entry may be submitted for approval and entry.

(Reprinted from Commerce Clearing House, 1938 Standard Federal Tax Service, Vol. 4 ¶9530.)

A. P. Bardet and E. Bardet, Co-partners, Doing Business as the Pioneer Motor Bearing Co., Plaintiffs, v. United States of America, Defendant.

Southern Division of the District Court of the United States for the Northern District of California. No. 20364-L. Decided May 18, 1938.

Excise tax on automobile parts.—The excise tax imposed by Section 606 (c) of the 1932 Act does not apply to sales of rebabbitted automobile connecting rods by one who acquires such rods second-hand and rebabbits the same, and who neither manufactures, produces, nor imports any other automobile parts or accessories.

See Reg. 46, Art. 41 at 393 CCH ¶2614.176.

LOUDERBACK, J.: The above entitled cause came on regularly for trial before the above entitled Court, Honorable Harold Louderback presiding therein, sitting without a jury.

Plaintiffs appeared in person and by their attorneys, A. E. Graupner and Theodore L. Breslaure, and the defendant appeared by its attorney, Frank J. Hennessy, United States Attorney, being represented by Esther B. Phillips, Deputy United States Attorney.

Witnesses were sworn and testimony given at the said hearing, and the Court being fully advised in the facts and the law, makes its Findings of Fact as follows:

FINDINGS OF FACT

Finds that all the allegations of plaintiff's complaint are true:

Finds that all the allegations of paragraph I and all the allegations of paragraph III except the sentence beginning on line 28 of page 2 of defendant's Answer, and all the allegations in paragraphs V and VI of defendant's Answer are untrue; and more particularly,

The Court finds that the plaintiffs, A. P. Bardet and E. Bardet, were and are at all the times involved in this action, co-partners.

Prior to the 14th day of April, 1937, the defendant, acting by and through the Bureau of Internal Revenue of the Treasury Department and the Collector of Internal Revenue for the First District of California, determined that there was due from the plaintiffs, pursuant to the provisions of Paragraph C of Section 606 of the Revenue Act of 1932, certain excise taxes upon the sale by plaintiffs of certain automobile parts or accessories, to-wit: connecting rods, in the sum of One Thousand Nine Hundred Twenty-nine and 61/100 Dollars (\$1929.61); and pursuant to such determination, defendant assessed said taxes, or caused the same to be assessed against the plaintiffs; and the Collector of Internal Revenue for the First District of California made demand upon plaintiffs for the payment of said taxes together with a penalty in the sum of Ninety-six and 48/100 Dollars (\$96.48) and interest in the sum of Forty-four and 61/100 Dollars (\$44.61), the total demand aggregating the sum of Two Thousand Seventy and 70/100 Dollars (\$2070.70); plaintiffs, pursuant to said assessment and demand, paid to said Collector of Internal Revenue for the First District

of California the aforesaid sum of Two Thousand Seventy and 70/100 Dollars (\$2070.70) on the 14th day of April, 1937.

The excise taxes so assessed against, and collected from the plaintiffs, as set forth in the preceding paragraphs, were in respect of sales of certain automobile parts or accessories, to-wit, connecting rods, made by plaintiffs during the period from June, 1932 to July, 1936.

The Collector of Internal Revenue for the First District of California paid and remitted to the defendant said excise taxes and penalty and interest thereon so assessed against, and collected from the plaintiffs as aforesaid, and the defendant received and still retains the same.

On the 7th day of May, 1937, plaintiffs filed with the Collector of Internal Revenue for the First District of California, their claim for refund of the aforesaid excise taxes and penalty and interest thereon, assessed against, and collected from the plaintiffs as hereinbefore set forth, in the aggregate amount of Two Thousand Seventy and 70/100 Dollars (\$2070.70). Said claim was made and duly filed upon the official form prescribed therefor by the Treasury Department of the United States and was so filed within four years after the date of payment of said taxes, and said claim set forth the reasons for, and the grounds supporting, the refund of said taxes.

Thereafter, and on or about the 23rd day of October, 1937, the Hon. Guy T. Helvering, Commissioner of Internal Revenue of the United States, acting by and through the Hon. D. S. Bliss, Deputy Commissioner of Internal Revenue, rejected and disallowed said claim for refund, and notified the plaintiffs of such rejection and disallowance by letter signed by said Deputy Commissioner, dated

the 23rd day of October, 1937, and which was received by the plaintiffs on or about the 27th day of October, 1937.

The plaintiffs did not include the aforesaid excise taxes in the price of the articles with respect to which said taxes were imposed; and plaintiffs did not collect the amount of said taxes, or any part thereof, from the vendee or vendees of the articles in respect of which said taxes were imposed. The burden of said taxes was borne solely and exclusively by the plaintiffs and the burden of none of said taxes was passed on by the plaintiff to its customers or vendees.

All of the aforesaid excise taxes were assessed and imposed in respect of sales by plaintiffs of rebabbitted connecting rods. All of said connecting rods were originally manufactured by persons, firms or corporations other than plaintiffs and before their acquisition by plaintiffs had been used as operating parts of automobile motors, and by reason of such use the babbitt metal bearings constituting parts of said rods were worn, chipped, roughened and otherwise impaired.

Plaintiffs imported none of said connecting rods in respect of which said excise taxes were assessed, but obtained all thereof from sources within the United States. At no time have plaintiffs imported, nor do they now import, any automobile parts or accessories whatsoever.

The rebabbing process to which the above mentioned used and second-hand connecting rods were subjected in plaintiffs' shop consisted of melting and removing therefrom the old, worn, babbitt metal bearings and of casting therein new babbitt metal bearings and grinding, polishing and grooving the same so as to make said rods again suitable for use as operating parts of automobile motors.

The babbitt metal bearings contained in the connecting rods involved in this suit were of inconsequential size and bulk compared with the total size and bulk of the connecting rods.

The connecting rods which were rebabbitted by plaintiffs, and in respect of which the excise taxes involved in this suit were imposed, did not lose their identity as connecting rods during, or as a result of, the rebabbitting process in plaintiffs' shop.

None of the identifying symbols, trade-marks, numbers or other identifying data appearing on said connecting rods was moved, marred or obliterated during, or as a result of, the rebabbitting process in plaintiffs' shop, but on the contrary, all such identifying numbers and data were left intact.

A rebabbitted connecting rod is a second-hand connecting rod; and all of the connecting rods which were rebabbitted by plaintiff, and in respect of which the taxes involved in this case were imposed, were second-hand connecting rods when sold by plaintiffs after the same were rebabbitted.

The arrangement under which plaintiffs kept on hand and in stock a supply of rebabbitted connecting rods of various kinds and makes was a matter of convenience to the plaintiffs and their customers so that the customers of plaintiffs, by exchanging their old, used rods for rebabbitted rods and paying a consideration in cash for the rebabbitting, could obtain prompt delivery of rebabbitted rods without waiting for the actual rebabbitting process to be completed upon the customers' own rods.

Rebabbitted connecting rods were widely known and used in the automobile industry for many years prior to the enactment of the Revenue Act of 1932, including Section 606 thereof, and there were many persons, firms and corporations in various parts of the United States engaged in the business of rebabbitting connecting rods at the time of enactment of the Revenue Act of 1932, and for many years prior thereto.

The rebabbitting process performed by plaintiffs upon the connecting rods in respect of which the excise taxes involved in this case were imposed constituted the repair, rehabilitation or reconditioning of used and second-hand connecting rods, and did not constitute the manufacture or production of connecting rods.

The plaintiff at no time manufactured, produced, or imported any automobile parts or accessories whatsoever.

The sales of rebabbitted connecting rods in respect of which the excise taxes involved in this case were imposed did not constitute the sales of automobile parts or accessories by the manufacturer, producer or importer.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court makes its Conclusions of Law as follows:

The plaintiffs have complied with all statutory conditions constituting conditions precedent to the institution and maintenance of this suit.

The plaintiffs are not, and were not during the times involved in this suit, the manufacturer, producer or im-

porter of automobile connecting rods or of any automobile parts or accessories whatsoever within the meaning of Section 606 of the Revenue Act of 1932.

The tax imposed by Section 606 (c) of the Revenue Act of 1932 applies only to sales of automobile parts or accessories when sold by the manufacturer, producer or importer.

(TAX NOT APPLICABLE)

The excise tax imposed by Section 606 (c) of the Revenue Act of 1932 does not apply to sales of rebabbitted automobile connecting rods by one who acquires such rods second-hand and rebabbits the same, and who neither manufactures, produces nor imports any other automobile parts or accessories.

In holding and determining that the tax imposed by Section 606 (c) of the Revenue Act of 1932 applied to sales of rebabbitted connecting rods by plaintiffs during the period from June, 1932, to July, 1936, the Commissioner of Internal Revenue has exceeded the authority granted him under the Internal Revenue Act of 1932.

Under the evidence and the law the plaintiffs are entitled to judgment against defendant in the sum of Two Thousand Seventy and 70/100 Dollars (\$2070.70) together with interest thereon from the 14th day of April, 1937, at the rate of six per cent (6%) per annum.

Let judgment be entered in accordance with the above Findings and Conclusions.

(Reprinted from Commerce Clearing House, 1939 Standard Federal Tax Service, Vol. 4, ¶9259)

Leo G. Becker and Fred Florence, doing business as the Becker-Florence Electric Company, Plaintiff, v. United States of America, Defendant.

District Court of the United States for the Western Division, Western District of Missouri. No. 9859. Decided December 27, 1938.

Excise tax on auto parts: Reconditioned generators and armatures.—Excise tax on sales by the manufacturer of automobile parts and accessories is not incurred where petitioners acquired used generators and armatures from automobile owners or from garages and repair shops, reconditioned them and sold them to automobile owners and repair shops, keeping a stock of them on hand so that the car owner would not be delayed while his generator was being repaired.

See Reg. 46, Art. 41 at 393 CCH ¶2614.023.

L. V. Copley, 29 Dierks Bldg., Kansas City, Mo., for the plaintiff. Thomas A. Costolow, Assistant U. S. Attorney, James W. Morris, Assistant Attorney General, Federal Bldg., Kansas City, Mo., for the defendant.

MEMORANDUM OPINION

REEVES, D. J.: This is a suit for refund of taxes paid to the United States Collector of Internal Revenue and remitted by him to the treasury of the government.

The taxes were imposed for a period extending between June, 1932 and May, 1935. The government authorities deemed the imposition of the tax as proper under paragraph (c) of Section 606 of the Revenue Act of 1932. Applicable portions of the section are as follows:

There is hereby imposed upon the following articles sold by the manufacturer, producer, * * * a tax equivalent to the following percentages of the price, for which so sold * * * (c) parts or accessories * * * for any of the articles enumerated in subsection (a) or (b), 2 per centum.

(WHO IS A MANUFACTURER?)

It was the contention of the government that the plaintiffs were the manufacturers and producers of generators and armatures for use in automobiles and being accessories within the purview of the statute.

On the other hand it is contended by the plaintiffs that the generators and armatures sold by it were merely reconditioned or repaired generators and armatures acquired by it either from automobile owners or from garage owners and repair shops where such generators and armatures had been abandoned because defective from wear and tear in use. The plaintiffs say that such generators and armatures became and were second-hand accessories. It was the evidence that the plaintiffs not only repaired generators and armatures for automobile owners, but that the principal part of their business was the acquisition of worn and defective generators and armatures, and the sale thereof, after having been reconditioned and repaired, to automobile owners and garages. It was a convenience, according to the testimony, to have a generator and an armature at hand to replace a defective or useless one so that the car owner would not be delayed while his generator was being repaired. As aptly stated by counsel, the sole question for decision is whether the plaintiffs should be classed as manufacturers and producers of such generators and armatures so as to justify the imposition of the tax.

Other facts will be stated in the course of this memorandum opinion.

1. As a postulate or premise to a proper decision of the case it should be kept in mind that the language of the statute should not be extended by interpretation beyond its clear import, and that the burdens of a tax should not be increased by implication or inference from the provisions of the statute. *Bankers Trust Co. v. Frank K. Bowers*, 295 F. 89 (1 USTC ¶87).

2. The Congress, in seeking to provide for an equitable and just application of the tax, specifically provided that, in cases where the manufacturer of automobile accessories sold its product to the manufacturer of automobiles to be used as accessories thereon, the tax was levied upon the vendee and not upon the manufacturer. And for the purpose of the section, "the vendee shall be considered the manufacturer or producer of the parts or accessories so resold."

The statute did not provide a special meaning for the words "manufacturer" and "producer". It is obvious from the provisions just mentioned that it was the object of the Congress to use the words "manufacturer" and "producer" in their recognized and ordinarily accepted meaning. One is confirmed in this conviction by the fact that the Congress, in imposing a tax on other articles of manufacture, specifically took the word "manufacture" out of the usual significance of the word and gave it a special and an unusual meaning. For instance, by Section 710, Title 26 USCA, a manufacturer of tobacco is defined to be:

Every person whose business it is to manufacture tobacco or snuff for himself, or who employs others to manufacture tobacco or snuff, whether such manufacture

be by cutting, pressing, grinding, crushing, or rubbing of any raw or leaf tobacco, or otherwise preparing raw or leaf tobacco, or manufactured or partially manufactured tobacco or snuff, or the putting up for use or consumption of scraps, waste, clippings, stems, or deposits of tobacco resulting from any process of handling tobacco, or by the working or preparation of leaf tobacco, tobacco stems, scraps, clippings, or waste, by sifting, twisting, screening, or any other process, shall be regarded as a manufacturer of tobacco.

It was obvious from this enactment that the Congress intended to extend the meaning of "manufacture" beyond that as usually understood and accepted. The Congress did the same thing by Section 972, Title 26 USCA, where a manufacturer was defined to be:

Every person who manufactures oleomargarine for sale shall be deemed a manufacturer of oleomargarine. And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any substance which causes such oleomargarine to be yellow in color, determined as provided in paragraph 2 of Section 971 (a), shall also be held to be a manufacturer of oleomargarine within the meaning of this chapter.

By reason of the fact that the Congress in dealing with the same subject, that is Internal Revenue, found it necessary to give to the words under discussion a special meaning in some cases would carry the implication that the use of the words, in the absence of such special definitions, would be understood in the ordinary and usual sense.

(CASES COMPARED)

3. In the case of *Friday v. Hall and Kaul Co.*, 216 U. S. 449, the Supreme Court of the United States reversed the Third Circuit Court of Appeals, 158 F. 593, where a question arose on a proper interpretation of the word “manufacturing” as used in Bankruptcy Law. Unhappily, the Court of Appeals had held that the production of concrete arches, etc., was not manufacturing within the purview of the bankruptcy law. The Supreme Court said it was. At p. 454, the Supreme Court said that “manufacturing has no technical meaning.” Yet it quoted approvingly the language of Mr. Justice Field in *Kidd v. Pearson*, 128 U. S. 1, l. c. 20, where it said that:

“Manufacture is transformation, the fashioning of raw materials into a change of form for use.”

The court then adverted to the case of *Tide Water Oil Company v. United States*, 171 U. S. 210, l. c. 216, and approved the meaning of the word “manufacturing” as there used as follows:

Mr. Justice Brown, referring to the expansion of the meaning of the word “manufacture”, said that “the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product.”

In the same opinion the court also approved an opinion of the Eighth Circuit, styled *In re First National Bank*, 152 F. 64, wherein the late Judge Walter H. Sanborn defined manufacturing as follows:

Its ordinary significance is producing a new article of use * * * by the application of skill and labor to the raw materials of which it is composed.

A case having many features similar to the case now being considered is that of *Cate v. Connell*, 173 Fed. 445, 1. c. 447, where the court said:

We do not think that the repairing of automobiles * * * can fairly be described as a manufacturing pursuit. It seems to have been chiefly, if not altogether, the adjustment of automobile parts bought from other persons, to existing automobiles.

Corpus Juris defines manufacture as “anything made from raw materials by the hand, by machinery, or by art.” 38 C. J. Section 4, 966.

As a verb it is defined to mean:

To change and modify natural substances so that they become articles of value and use. 38 C. J. Section 5, p. 966.

In *Words and Phrases*, Vol. 4, p. 273, manufacturing is distinguished from repairing. It is there said:

* * * for “manufacturing” is the system of industry which produces manufactured articles, and “manufacture” is the production of articles for use from raw or prepared materials, by giving them new forms, qualities, and properties, or combinations, and “repairing” is the making or restoring of an article or thing to its completeness.

The case cited in support of this distinction was *State v. Newman Lumber Co.*, 59 South, 923, 1. c. 926; 102 Miss. 802.

(REPAIR V. MANUFACTURE)

4. In this case the plaintiffs acquired by purchase or exchange all worn and defective generators and armatures and by a process of cleaning, repairing and supplying new parts, the generators and armatures were restored and reconditioned for further use.

As thus repaired and reconditioned the devices were sold, sometimes in quantities. Under the taxing law under observation the original manufacturer paid a tax on the devices unless sold to the manufacturer of a motor vehicle in which they were to be used, in which case a tax was paid on the fully equipped motor vehicle. If sold as an accessory by the manufacturer a tax was paid as required by statute but this was all of the manufacturer's tax.

To give the statute the meaning contended for by the government would involve endless complications as affecting dealers, garage owners and repair men in general. No definite line could well be drawn and twilight ones would develop so frequently and from so many angles that a just and fair and practicable enforcement of the law would become impossible.

It seems obvious that the Congress never intended that the tax should be applied as in this case. Accordingly the plaintiffs are entitled to have judgment for a return of the tax required of them. An appropriate journal entry to this end will be prepared and submitted by counsel for the plaintiffs.

(Reprinted from Commerce Clearing House, 1939 Standard Federal Tax Service, Vol. 4, Paragraph 9219.)

Clawson and Bals, Inc., a corporation, v. Carter H. Harrison, Collector of Internal Revenue in and for the First District of Illinois.

United States District Court, Northern District of Illinois, Law 47068. Decided November 26, 1938.

FINDINGS OF FACT

1. Plaintiff, Clawson & Bals, Inc., is a corporation duly organized and existing under the laws of Illinois and, during the times herein mentioned, had its principal office and place of business in the City of Chicago, State of Illinois, and within the Northern District of Illinois and the Eastern Division thereof.

2. The defendant, Carter H. Harrison, was appointed Collector of Internal Revenue in and for the First District of Illinois, on August 21, 1933, and has been such Collector of Internal Revenue at all times subsequent thereto, and is a citizen, resident and inhabitant of the Northern District of Illinois.

3. Plaintiff was incorporated April 17, 1925, and its purpose, among others, was "to manufacture, buy, sell, export and import, deal in and deal with, all kinds of automobile and automobile accessories, and any and all other articles, incident to automobiles". Its principal business, however, has been to make automobile connecting rods and sell them throughout the world to wholesalers, known also as jobbers, for replacement purposes in connection with the repairing by garagemen and mechanics of automobile motors. It made such connecting rods from new forgings, or castings, as well as from

forgings or castings or worn-out and discarded connecting rods.

4. Prior to and since June 21, 1932, plaintiff operated seven plants or factories, namely, a large one in Chicago, and six smaller ones in Moline, Illinois, Minneapolis, Detroit, New York City, Atlanta and Dallas, for the making of connecting rods. It maintained warehouses in divers cities from which it distributed its product and had points of distribution in other cities. It employed salesmen and engaged manufacturers' representatives for the distribution of its products.

5. Plaintiff has one hundred employees engaged in the production of connecting rods, of which forty are employed in the Chicago plant and sixty in the other six plants. Its plant equipment includes, among other things, lathes, drill presses, broaching machines, boring jigs, babbit pots, emery wheels, special molds and babbitting machines, which were used in the production of the connecting rods in question.

6. Plaintiff produced and maintained a stock of more than five hundred different types of connecting rods, assigned to each type a stock number of its own, such as CB1, CB2, down to CB524, covering all makes of automobiles. All of plaintiff's connecting rods were designated and known to the trade by the trade names, "C & B Rods", and were sold under such trade name. Plaintiff advertised in the leading trade journals and publications and was listed in the Chicago classified telephone directories under the classification of Automobile Parts—Manufacturers. It was also a member of the Manufacturers Division of the National Standard Parts Association, a trade association.

7. The connecting rod is the means of transmitting power generated by discharge in the cylinder, in the piston head, to the crank shaft by being attached to the crank pin. In the large end of the connecting rod there is a babbitt bearing known as the crank shaft bearing. The babbitt bearing is within the parts of the rod known as the cap and shank, which are held together by two bolts and nuts. The other, or smaller end of the rod, is known as the wrist pin end. At least half of the rods produced by plaintiff during the taxable period had bronze bushings in the wrist pin end. The bushings are also bearings and are just as important and just as necessary as the babbitt bearing at the large end. The one bearing cannot work successfully without the other.

8. During the taxable period, June 21, 1932, to June 30, 1936, plaintiff's total sales of automobile connecting rods aggregated \$4,355,752.50. All such sales were of connecting rods manufactured and produced by plaintiff, as hereinafter set forth, both from new castings or forgings which plaintiff purchased and machined as well as from worn-out and discarded connecting rods which plaintiff obtained either from "junkies", or from jobbers who turned them in as part payment on purchases from plaintiff on what is known in the trade as the exchange basis for replacement parts. A "Junkie" is a man who goes to garages, automobile wreckers, and elsewhere where he can procure used and discarded parts which he thereafter sells to plaintiff and others. None of the used, worn-out and discarded connecting rods had any commercial value as automobile parts because they were no longer fit for use. They were scrap and had only a junk or scrap value when acquired by plaintiff and, although such scrap was recognized as having once been

connecting rods, a manufacturing process was necessary in order to make a new and serviceable product. Plaintiff carried on that manufacturing process. The scrap material was dismantled and prepared for the manufacturing process; it was combined with new materials, put through grinding operations, machining operations, there was an assembling and combining of all materials, together with workmanship, and the employment of skill before plaintiff's marketable article was produced. The completed article as manufactured and produced by plaintiff had a value relatively much greater than that of the worn-out article in its scrap condition. In other words, plaintiff manufactured and produced connecting rods from scrap.

9. The following is a summary of plaintiff's processes and operations in the manufacture and production of connecting rods from scrap:

The worn-out, unusable and discarded rods came to plaintiff in packages, boxes and bags. Plaintiff opened and checked them against the shipping ticket; they were thrown on a table and sorted out according to their particular makes and numbers. At least during the period December, 1934, and for at least five or six months in 1935, plaintiff ground off of all worn-out rods originally made by General Motors Corporation and its subsidiaries, the trade names and other marks of identification pursuant to an agreement with General Motors.

The forgings went into the babbitt room where the two bolts and nuts were taken out and the cap and shank separated. Some bolts and nuts were salvaged, others were junked. The shank and cap were separately placed in a melting pot and all old babbitt metal and what remained of the original babbitt bearing was rewound. The

old babbitt was sold as salvage. Plaintiff used entirely new babbitt in all of its babbitting processes. The babbitt metal consisted of 89% tin, 3.7% copper, and 7.3% antimony. A flux was then applied to prepare the cap and rod for a coating of tin to act as a bond and make the new babbitt metal stick so as to become part of the steel forging. After applying the flux, the arm (shank) and cap were separately dipped into a pot containing molten tin. The tin coating was necessary in order to band the steel forging and babbitt together. The cap and arm are separately put into a machine with the proper size mold, between which mold and the cap on the one hand and the mold and the arm on the other, a man poured new molten babbitt metal. The two parts were then removed from the machine and permitted to cool. The newly poured babbitt extended beyond each side of what was to become the babbitt bearing. Before the cap and arm were assembled, each was subjected to lathing operation and the protruding babbitt was thereby cut away so as to leave an even surface and permit the two parts to fit together and make a circle when assembled. Then the cap and arm were assembled by putting in new shims (if it was the type of rod which required shims) and bolts and nuts. The rod and cap were placed upon a machine which turned and tightened each of the nuts.

The inside of the new babbitt bearing was rough bored on a machine to approximately 10/1000ths smaller than what was to become the finished diameter. Then the cutters were changed and a broaching operation occurred whereby the babbitt bearing was further cut, grooved, and channels were cut on the inside of the babbitt bearing for oiling purposes, and it was drilled through, where necessary, in order to connect with the oil holes in the

steel forging or casting. In a further and final broaching operation the babbitt bearing was cut, that is, machined, to the prescribed diameter. The assembled rod was then placed on a pressing machine and a new bronze bushing placed above the old bushing and, under pressure, the old one was forced out and the new one was forced in. In the case of connecting rods for Fords, a further machine operation was required by which the bushing was completely severed and grooved on the inside. All of the rods were then checked for alignment and twist in order that they would leave plaintiff's plant as a perfect rod. Each was placed in a vertical position upon a jig machine, part of which went through the opening in the wrist pin end and another part through the opening at the crank shaft end. The indicator would show just how much it was out of line and the necessary adjustments then were made. At least half of the rods made by plaintiff were the type that required bushings. After the rod had been aligned, it would go to a bench where a man inspected it and if there were any pieces of babbitt hanging on the sides, he would take them off and clean the rod wherever necessary. The rod was carefully inspected for blow holes, which occurred now and then, and was given such inspection as was necessary to insure a product as perfect as modern machinery can produce. The rods were then placed in a machine where they were covered with grease. After being greased, they were taken in the stock room and placed on shelves in separate bins containing plaintiff's part number, which numbers conformed to those used on plaintiff's price lists and catalog. The rods were boxed and labeled just before shipping. The boxes were labeled at both ends. The label contained a description of the contents, name of

the car which the rods would fit, the number or model, plaintiff's number, that is, CB-1, CB-2, as the case may be, together with plaintiff's name and a trade symbol consisting of the letters "C. & B." in a small solid circle. The same type of label was placed on the ends of all boxes in which plaintiff shipped connecting rods, whether they contained inside rods made entirely of virgin metal, or from worn-out rods, or a mixture of each.

10. Plaintiff kept but one stock with respect to each number and had but one outright price with respect to the rods, irrespective of whether they were produced from entirely new castings or from scrap, and regarded the article made from scrap as equivalent to any similar product made entirely with virgin metal. The rods made from scrap were in competition with similar products made entirely of virgin metal and were just as serviceable. They were held out for sale and sold on the same basis and under the same warranties as the connecting rods produced from entirely virgin forgings. In other words, plaintiff made no distinction between such connecting rods in the numbering, cataloging, selling, billing, advertising, shipping, labeling, pricing, marketing, quality, warranty, guarantee, or otherwise.

11. When new casting or forgings arrived at the babbitting place, they went through substantially the same routine, the same processes, operations, assembling and finishing as outlined in the immediately preceding paragraph with respect to the production by plaintiff of connecting rods from scrap, that is, from used or worn-out connecting rods. Whether new castings or scrap were used the operations commencing with the babbitting stage were handled by the same men and on the same machines. All of plaintiff's processes involved grinding operations,

machining operations, assembling and combining of materials, together with workmanship and the employment of skill before the connecting rod was completed.

12. Plaintiff filed monthly excise tax returns on all of its sales of connecting rods occurring during the period June 21, 1932 to June 30, 1936, inclusive, and reported a total tax of \$42,606.10, which it paid in monthly amounts. Thereafter, the Commissioner of Internal Revenue determined that the aggregate tax due by plaintiff for the period June 21, 1932 to June 30, 1936, inclusive, was \$87,115.05. Accordingly, additional assessments were duly made in the total further amount of \$44,508.95 tax and \$9,732.07 interest. The addition assessments were based upon the commissioner's finding that plaintiff did not report that portion of the sales price which was paid by an allowance made for a used or worn-out connecting rod or rods, in such of the sales transactions as did not involve all cash but consisted partly of cash and partly of such an allowance. On February 8, 1937, plaintiff paid to defendant as Collector of Internal Revenue, \$48,142.52, and on March 18, 1937, paid the remaining \$6,089.50.

13. On February 26, 1936, plaintiff filed a claim for the refund of \$54,232.02, representing \$44,508.95 of the foregoing tax assessments of \$87,115.05 and \$9,723.07 of interest so assessed and paid. The claim was predicated upon the ground that plaintiff was neither the manufacturer nor producer of the connecting rods on which the additional tax was based but that its process, "constituted only the repair", of used and second-hand connecting rods; also that it bore the burden of the tax. On March 30, 1938, the Commissioner of Internal Revenue rejected plaintiff's claim.

14. All of the automobile connecting rods manufactured, produced and sold by plaintiff during the taxable period June 21, 1932 to June 30, 1936, inclusive, as aforesaid, are automobile parts or accessories.

15. Plaintiff is and was the manufacturer and producer of all of the automobile connecting rods involved in this suit.

16. The allowance granted by plaintiff to customers who turned in used or worn-out connecting rods on account of purchases of plaintiff's connecting rods constituted parts of the total sales price.

CONCLUSIONS OF LAW

Upon the foregoing findings of fact the court makes and enters the following conclusions of law:

1. Plaintiff was and is a manufacturer and producer of automobile parts within the meaning of Section 606 of the Revenue Act of 1932.

2. Plaintiff was and is the manufacturer and producer of all of the automobile connecting rods sold by it and upon which the tax sought to be recovered was assessed against and collected from plaintiff.

3. The taxes assessed against and paid by plaintiff under the provisions of Section 606 of the Revenue Act of 1932, were lawfully assessed and collected.

4. Under the law and the evidence, defendant is entitled to judgment of dismissal with costs.

To the making and holding of the foregoing findings and conclusions, the plaintiff objects and excepts.

(Reprinted from copy furnished by counsel for Moroloy Bearing Service of Oakland, Ltd., a corporation.)

Moroloy Bearing Service of Oakland, Ltd., a corporation, Plaintiff, v. United States of America, Defendant.

Southern Division of the District Court of the United States for the Northern District of California. No. 21308-W. Decided July 16, 1940.

MEMORANDUM OPINION

This is an action wherein the plaintiff seeks to recover from the defendant the sum of \$1090.80 which it paid the defendant as excise tax under Section 606 (c) of the Revenue Act of 1932 upon the sale of rebabbitted connecting rods from 1933 to 1936.

The plaintiff now is and for a considerable time last past has been engaged in the business of rebabbitting connecting rods for the automobile trade generally in this state. When the rebabbitting of the connecting rods was finished, the connecting rods were delivered to the repairing jobber who in turn sold them to the garage or automobile repair man.

Plaintiff's right to recover herein depends upon whether the process of rebabbitting the connecting rods was one of manufacture or one of repair. If the former, the tax was properly imposed. If the process was one of repair only, then the tax was not owing and plaintiff may recover.

The evidence shows the connecting rods which plaintiff rebabbitted were in their original state manufactured by others, and only came into the hands of the plaintiff when certain parts of them became defective either from the burning out of the babbitt through friction while in operation, or through lack of proper lubrication, or on account of other causes.

In no manner did the evidence show the plaintiff manufactured the connecting rods themselves, but on the contrary, the evidence clearly showed that plaintiff was engaged in the repair and rehabilitation of connecting rods manufactured by others, when they became outworn and defective from use.

In Bouvier's Law Dictionary (Rawle's Revision, Unabridged) the words manufacture and repair, when used as verbs, are defined as follows:

Manufacture—To make or fabricate raw materials by hand, art, or machinery, and work into forms convenient for use.

Repair—To restore to a sound state after decay, injury, delapidation, or partial injury.

It would be just as logical to hold that a shoe cobbler was a manufacturer of shoes that were brought to him for repair because he nailed or sewed soles and heels on the shoes in the process of repairing them, as to hold that a mechanic was a manufacturer of connecting rods because he rehabilitated them. The process is a repair in the one case just as it is in the other. That plaintiff is repairing its own rods for sale whereas the shoe cobbler is repairing shoes for others is not significant. Whether or not a process is one of repair does not depend on the condition of the title to the repaired articles.

The court orders that judgment be entered in favor of the plaintiff in the sum of \$1099.80, with interest thereon as provided by law.

Let findings of fact and conclusions of law, and judgment be prepared in accordance with the opinion of the court.

MARTIN I. WELSH,
United States District Judge.

In the District Court of the United States for the Southern District of California, Central Division.

J. Leslie Morris Company, Inc., plaintiff, vs. United States of America, defendant. No. 433-M Civil.

CONCLUSIONS OF THE COURT.

McCORMICK, District Judge:

When consideration is given to the irreconcilable conflict of federal court decisions upon the crucial factual issue in this action, *i. e.*, whether taxpayer in reabbating used and damaged connection rods of automobiles is a manufacturer or producer of such parts or accessories, it is indisputable that there is more than doubt as to the meaning of the terms "manufacturer" or "producer" in Section 606 of the Revenue Act 1932 and Subsection (c) thereof. 47 Stat. at Large, Part 1, pp. 261-262, Title 33 U. S. C. A., Sec. 606.

Under such a record doubts arising under the taxing statute should be resolved against the taxing agency and favorable to the taxpayer. *Miller v. Nut Margarine Co.*, 284 U. S. 498, at page 508; *Erskine v. United States*, 9 Circuit, 1936, 84 F. (2d) 691.

It is only by straining the terms "manufacturer" and "producer" contained in the taxing statute under consideration from their usual, ordinary and normally understood meanings into all-inclusive situations that these terms of doubtful signification can be extended to a service station or processor such as plaintiff taxpayer, whose transactions under consideration in this cause are actually no more than repairing damaged used connecting rods of automobiles and charging for the repair job and service upon delivery of the customer's repaired rod or

of another rebabbited second-hand repaired rod. We think no such forced and omnibus meaning of the terms "manufacturer" or "producer" can be fairly attributed to Congress in order to subject the articles sold by the plaintiff to the tax under (c) of Section 606. There is nothing in the statute which intimates that such was the congressional intent. The decision of the District Court for the Northern District of California in *A. P. Bardet et al., d. b. a. Pioneer Motor Bearing Co. v. United States*, No. 20364L, decided May 18, 1938, 384 C. C. H. p. 10,589, where the taxpayers suing are competitors of the plaintiff who had engaged in a like process and business of rebabbiting connection rods of automobile engines, as the taxpayer, and who were held not to be manufacturers under the same statute as here involved, persuades us to conclude that the operations and practices shown by the record before us are neither manufacture nor production of automobile parts within the meaning of Subsection (c) of Section 606, Revenue Act 1932.

Our conclusions are also supported by the decision of the District Court (Mo., 1937) in *Hempy-Cooper Mfg. Co. v. United States*, 19 Am. Fed. Tax Reports 1313, and *Con-Rod Exchange, Inc., v. Hendrickson* (D. C., W. D. Wash., 1939), 28 F. Supp. 924. These cited tax cases involved rebabbited connecting rods of automobiles, and we think they present situations identical with the record before us in this action.

For the sake of uniformity, if for no other reason, taxpayers identically situated and doing precisely the same thing in relation to tax laws should be treated alike. Our inquiries and investigations have failed to disclose that the government has taken appeal in the cases referred to, and we are therefore justified in assuming that refunds

have been made to the respective taxpayers situated as is the plaintiff taxpayer in this action.

We are not unmindful of the decision of the Seventh Circuit Court of Appeals in *Clawson & Bals, Inc., v. Harrison, Collector*, 108 F. (2d) 991, reaching a contrary conclusion as to the meaning of the terms “manufacturer” and “producer” as applied to rebabbing activities similar to those shown by the record before us. This decision by a federal appellate court is entitled to and has been given careful study and respectful consideration. We feel, however, that no adequate discussion is to be found in the opinion of the court, differentiating between the broad meaning of the terms in matters of general concern and those relating specifically to tax laws. Such a distinction is supported by eminent authority, and we believe it must be regarded in ascertaining the meaning of tax legislation where the taxing statute itself does not clearly define the meaning of terms contained in it. See *Hartramft v. Wiegman*, 121 U. S. 609; *Kuenzle v. Collector, etc.*, 32 Philippine 516, and *Heacock Co. v. Collector, etc.*, 37 Philippine 979.

We think the rule of *stare decisis* is not applicable to the decision of the learned Court of Appeals of the Seventh Circuit. See *Continental Securities Co. v. Interborough R. T. Co.*, 165 F. 945, at p. 960.

Inasmuch as our Circuit Court of Appeals has not considered or decided the question under consideration in this section, we are justified in formulating and reaching our own conclusions under the record before us and in the light of other identical situations considered and determined uniformly by the federal courts of the Ninth Circuit. Accordingly, as the plaintiff taxpayer has not passed on the tax to the customer or to anyone, it is

entitled to recover the amount illegally collected, and the government is not entitled to anything under its counterclaim.

Findings and judgment are ordered for the plaintiff and against the defendant as prayed under the issues of complaint, answer and counterclaim.

Dated this July 24, 1940.

PARTS AND ACCESSORIES.

Section 606(c) of the Revenue Act of 1932.

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsections (a) or (b), 2 per centum. For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsections (a) or (b), shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. This subsection shall not apply to chassis or bodies for automobile trucks or other automobiles. * * *

Internal Revenue Bulletin, Cumulative Bulletin X1-2.
page 473.

REGULATIONS 46, ARTICLE 41:

Definitions of parts or accessories.

XI-47-5873 S. T. 573.

Taxability of various articles as automobile parts or accessories.

Advice is requested with respect to the taxability of several articles used in connection with automobiles, etc., under Section 606 of the Revenue Act of 1932. * * *

The tax also attaches to rebabbited connecting rods and reclaimed brake drums in which new steel bands have been inlaid where they are placed in stock to be sold as parts and accessories. However, where these articles are reconditioned in connection with an immediate repair job the tax does not attach.

Internal Revenue Bulletin, Cumulative Bulletin X1-2,
page 476.

REGULATIONS 46, ARTICLE 41:

Definition of parts or accessories.

XI-51-5937 S. T. 606.

Taxability of taximeters.

Advice is requested relative to the taxability of taximeters under Section 606(c) of the Revenue Act of 1932.

Taximeters are automobile accessories and are taxable under Section 606(c) of the Revenue Act of 1932. Small parts used in taximeters, such as bushings, pins, levers, and gears, which are commercial commodities not specially

designed for use in taximeters, are not taxable when sold separately.

No tax is due upon the sale of rebuilt or second-hand taximeters under Section 606(c) of the Revenue Act of 1932, provided they are not rebuilt or refinished to the extent that they lose their original identity.

Where a taximeter is repossessed by the manufacturer for nonpayment of the purchase price and the sale rescinded, the tax will attach to the price at which the article is resold by the manufacturer, but if a tax was paid on the first transaction, a credit or refund may be claimed in the amount of that part of the tax paid which is proportionate to the part of the sale price which is refunded or credited to the first purchaser.

Internal Revenue Bulletin, Cumulative Bulletin X11-1, page 384.

REGULATIONS 46, ARTICLE 19:

Scope of tax.

XII-11-6072 S. T. 648.

Taxability of retreaded and rebuilt tires.

Advice is requested whether retreaded and rebuilt tires are subject to the tax imposed by Section 602 of the Revenue Act of 1932.

The X Company purchases used tires from which the old rubber, tread, and side walls (including the name) are buffed off; the carcasses are then retreaded or rebuilt

by the use of new and/or reclaimed rubber and sold under various trade names, marked "Retreaded" on the side walls as a protection against any claim by the purchaser that they were sold as "new" tires. The old tires lose their identity in the process of retreading or rebuilding. Other used tires are retreaded by merely resurfacing or replacing the actual tread down to the tread line, the side walls showing the original name and the serial number not being disturbed.

The test of taxability where old material or material partly old and partly new is used in producing a tire suitable for use is whether the work done constitutes the manufacture of a tire or is merely a repair job. If the former, the tax is legally due. If the latter, no tax is involved. It is held that where the identity of the old tire is lost in the process the manufacture of a taxable tire results.

For example, where old tires are rebuilt from old carcasses by the use of either raw or reclaimed rubber, to the extent that the tires are not identifiable as the original tires, they are subject to tax when sold, on the basis of the full weight thereof, as provided by Section 602 of the Revenue Act of 1932.

Where tires are retreaded or rebuilt to order for customers who retain title to the old tires or carcasses, the person retreading the tires is not subject to tax.

The retreading of old tires by resurfacing or replacement of the actual tread down to the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article. (Italics supplied.)

Treasury Regulations 46, approved June 18, 1932:

Art. 4. Who is a manufacturer or producer.—As used in the Act, the term “producer” includes a person who produces a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article by combining or assembling two or more articles.

Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

A manufacturer who sells a taxable article in a knock-down condition, but complete as to all component parts, shall be liable for the tax under Title IV and not the person who buys and assembles a taxable article from such component parts.